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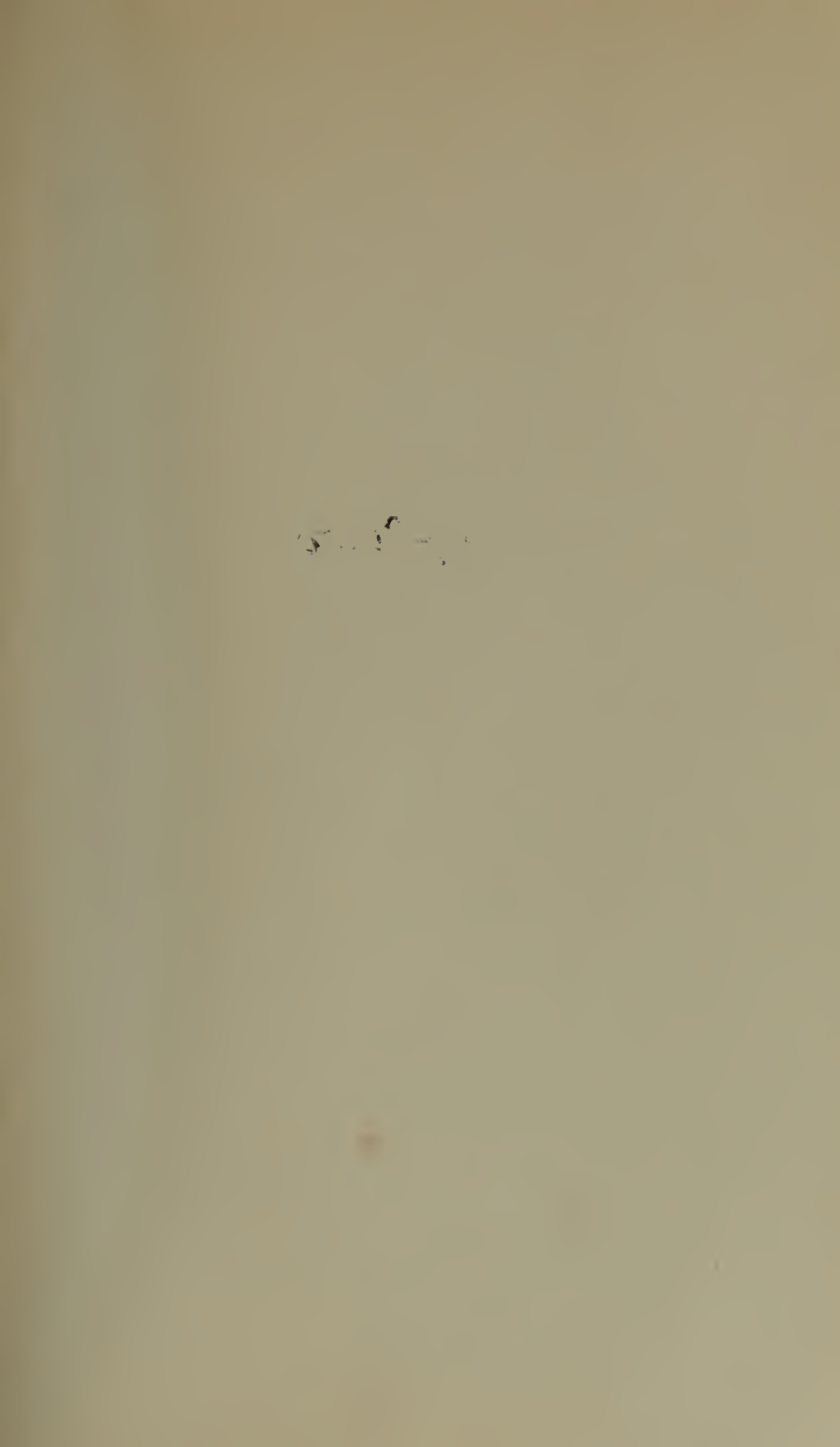
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No. 12769 3670

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United States  
Court of Appeals  
For the Ninth Circuit.

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CLARENCE C. CAMINOS,

Appellant,

vs.

TERRITORY OF HAWAII,

Appellee.

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Transcript of Record

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Appeal from the Supreme Court of the  
Territory of Hawaii

FILED

FEB 23 1951

PAUL P. O'BRIEN





No. 12769

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United States  
Court of Appeals  
For the Ninth Circuit.

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CLARENCE C. CAMINOS,

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Transcript of Record

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

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CHARLES M. HITE, ESQ.,

Public Prosecutor, and

ALLEN R. HAWKINS, ESQ.,

Assistant Public Prosecutor,

City Hall,  
Honolulu, T. H.,

Attorneys for the Territory,  
Defendant in Error.





In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii

Cr. No. 19015

January Term, 1947

TERRITORY OF HAWAII,

vs.

CLARENCE C. CAMINOS,

Defendant.

INDICTMENT FOR  
RECEIVING A BRIBE

First Count

The Grand Jury of the First Judicial Circuit of the Territory of Hawaii do present that Clarence C. Caminos, at the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Honorable Court, on or about the 18th day of August, 1945, he, the said Clarence C. Caminos, being then and there an executive officer, to wit, a duly commissioned, appointed and acting police officer of the Police Department of the City and County of Honolulu, Territory aforesaid, in disregard of his office as a police officer, and perverting the trust reposed in him, and for the private gain of him, the said Clarence C. Caminos, under color of his office, did, unlawfully, corruptly, wilfully and feloniously take, accept and receive of one Paul Au, then and there being, the sum of Nine Hundred

Dollars (\$900.00), in money, a more particular description of which is to the Grand Jury unknown, as a bribe, gift and gratuity under an agreement and with an understanding that he, the said Clarence C. Caminos, would not, in [4\*] the exercise of his function in his capacity, as a police officer aforesaid, apprehend and arrest the said Paul Au, Alfred B. T. Choy and Robert Hosoi, also known as Harry Hosoi, and divers and sundry other persons, to the Grand Jury unknown, for conducting, carrying on, playing and engaging in gambling and gambling games in the City and County of Honolulu, in violation of and prohibited by the laws of the Territory of Hawaii, which matter of the said apprehension and arrest was then and there pending and which might by law come and be brought before him, the said Clarence C. Caminos, in his official capacity aforesaid, and did then and there and thereby commit the crime of receiving a bribe, contrary to the form of the statute in such case made and provided.

### Second Count

And the Grand Jury of the First Judicial Circuit of the Territory of Hawaii do further present that Clarence C. Caminos, at the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Honorable Court, on or about the 25th day of August, 1945, he, the said Clarence C. Caminos, being then and there an executive officer, to wit, a duly commissioned, appointed and

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\* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

acting police officer of the Police Department of the City and County of Honolulu, Territory aforesaid, in disregard of his office as a police officer, and perverting the trust reposed in him, and for the private gain of him, the said Clarence C. Caminos, under color of his office, did, unlawfully, corruptly, wilfully and feloniously take, accept and receive of one Paul Au, then and there being, the sum of Five Hundred Dollars (\$500.00), in money, a more particular description of which is to the Grand Jury unknown, as a bribe, gift and gratuity under an agreement and with an understanding that he, the said Clarence C. Caminos, would not, in the exercise of his function in his capacity, as a police officer aforesaid, apprehend and arrest the said Paul Au, Alfred B. T. Choy and Robert Hosoi, also known as Harry Hosoi, and divers and sundry other persons, to the Grand Jury unknown, for conducting, carrying on, playing and engaging in gambling and gambling games in the City and County of Honolulu, in violation of and prohibited by the laws of the Territory of Hawaii, which matter of the said apprehension and arrest was then and there pending and which might by law come and be brought before him, the said Clarence C. Caminos, in his official capacity aforesaid, and did then and there and thereby commit the crime of receiving a bribe, contrary to the form of the statute in such case made and provided.

### Third Count

And the Grand Jury of the First Judicial Cir-

cuit of the Territory of Hawaii do further present that Clarence C. Caminos, at the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Honorable Court, on or about the 2nd day of September, 1945, he, the said Clarence C. Caminos, being then and there an executive officer, to wit, a duly commissioned, appointed and acting police officer of the Police Department of the City and County of Honolulu, Territory aforesaid, in disregard of his office as a police officer, and perverting the trust reposed in him, and for the private gain of him, the said Clarence C. Caminos, under color of his office, did, unlawfully, corruptly, wilfully and feloniously take, accept and receive of one Paul Au, then and there being, the sum of Two Thousand Dollars (\$2000.00), in money, a more particular description of which is to the Grand Jury unknown, as a bribe, gift and gratuity under an agreement and with an understanding that he, the said Clarence C. Caminos, would not, in the exercise of his function in his capacity, as a police officer aforesaid, apprehend and arrest the said Paul Au, Alfred B. T. Choy and Robert Hosoi, also known as Harry Hosoi, and divers and sundry other persons, to the Grand Jury unknown, for conducting, carrying on, playing and engaging in gambling and gambling games in the City and County of Honolulu, in violation of and prohibited by the laws of the Territory of Hawaii, which matter of the said apprehension and arrest was then and there pending and which might by law come and be brought before him, the



said Clarence C. Caminos, in his official capacity aforesaid, and did then and there and thereby commit the crime of receiving a bribe, contrary to the form of the statute in such case made and provided.

#### Fourth Count

And the Grand Jury of the First Judicial Circuit of the Territory of Hawaii do further present that Clarence C. Caminos, at the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Honorable Court, on or about the 9th day of September, 1945, he, the said Clarence C. Caminos, being then and there an executive officer, to wit, a duly commissioned, appointed and acting officer of the Police Department of the City and County of Honolulu, Territory aforesaid, in disregard of his office as a police officer, and perverting the trust reposed in him, and for the private gain of him, the said Clarence C. Caminos, under color of his office, did, unlawfully, corruptly, wilfully and feloniously take, accept and receive of one Paul Au, then and there being, the sum of Five Hundred (\$500.00), in money, a more particular description of which is to the Grand Jury unknown, as a bribe, gift and gratuity under an agreement and with an understanding that he, the said Clarence C. Caminos, would not, in the exercise of his function in his capacity, as a police officer aforesaid, apprehend and arrest the said Paul Au, Alfred B. T. Choy and Robert Hosoi, also known as Harry Hosoi, and divers and sundry other persons,

to the Grand Jury unknown, for conducting, carrying on, playing and engaging in gambling and gambling games in the City and County of Honolulu, in violation of and prohibited by the laws of the Territory of Hawaii, which matter of the said apprehension and arrest was then and there pending and which might by law come and be brought before him, the said Clarence C. Caminos, in his official capacity aforesaid, and did then and there and thereby commit [7] the crime of receiving a bribe, contrary to the form of the statute in such case made and provided.

### Fifth Count

And the Grand Jury of the First Judicial Circuit of the Territory of Hawaii do further present that Clarence C. Caminos, at the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of his Honorable Court, on or about the 16th day of September, 1945, he, the said Clarence C. Caminos, being then and there an executive officer, to wit, a duly commissioned, appointed and acting police officer of the Police Department of the City and County of Honolulu, Territory aforesaid, in disregard of his office as a police officer, and perverting the trust reposed in him, and for the private gain of him, the said Clarence C. Caminos, under color of his office, did, unlawfully, corruptly, wilfully and feloniously take, accept and receive of one Paul Au, then and there being, the sum of Nine Hundred (\$900.00), in money, a more particular description of which is to the Grand



Jury unknown, as a bribe, gift and gratuity under an agreement and with an understanding that he, the said Clarence C. Caminos, would not, in the exercise of his function in his capacity, as a police officer aforesaid, apprehend and arrest the said Paul Au, Alfred B. T. Choy and Robert Hosoi, also known as Harry Hosoi, and divers and sundry other persons, to the Grand Jury unknown, for conducting, carrying on, playing and engaging in gambling and gambling games in the City and County of Honolulu, in violation of and prohibited by the laws of the Territory of Hawaii, which matter of the said apprehension and arrest was then and there pending and which might by law come and be brought before him, the said Clarence C. Caminos, in his official capacity aforesaid, and did then and there and thereby commit the crime of receiving a bribe, [8] contrary to the form of the statute in such case made and provided.

A true bill found this 26th day of February, 1947.

/s/ ARTHUR C. HILLIGER,

Acting Foreman of the  
Grand Jury.

/s/ EDWARD N. SYLVA,

Special Assistant Public Prosecutor of the City  
and County of Honolulu.

[Endorsed]: Filed February 26, 1947. [9]

In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii

Cr. No. 19018

January Term, 1947

TERRITORY OF HAWAII,

vs.

CLARENCE C. CAMINOS,

Defendant.

INDICTMENT FOR  
RECEIVING A BRIBE

First Count

The Grand Jury of the First Judicial Circuit of the Territory of Hawaii do present that Clarence C. Caminos, at the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Honorable Court, on or about the 6th day of January, 1946, he, the said Clarence C. Caminos, being then and there an executive officer, to wit, a duly commissioned, appointed and acting police officer of the Police Department of the City and County of Honolulu, Territory aforesaid, in disregard of his office as a police officer, and perverting the trust reposed in him, and for the private gain of him, the said Clarence C. Caminos, under color of his office, did, unlawfully, corruptly, wilfully and feloniously take, accept and receive of one Paul Au, then and there being, the sum of Three Thousand Nine Hundred Dollars (\$3,900.00), in money, a more particular description of which is

to the Grand Jury unknown, as a bribe, gift and gratuity under an agreement and with an understanding that he, the said Clarence C. Caminos, would not, in the exercise of his function in his capacity as a police [11] officer aforesaid, apprehend and arrest the said Paul Au, and divers and sundry other persons, to the Grand Jury unknown, for conducting, carrying on, playing and engaging in gambling and gambling games in the City and County of Honolulu, in violation of and prohibited by the laws of the Terrtorry of Hawaii, which matter of the said apprehension and arrest was then and there pending and which might by law come and be brought before him, the said Clarence C. Caminos, in his official capacity aforesaid, and did then and there and thereby commit the crime of receiving a bribe, contrary to the form of the statute in such case made and provided.

### Second Count

And the Grand Jury of the First Judicial Circuit of the Territory of Hawaii do further present that Clarence C. Caminos, at the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Honorable Court, on or about the 13th day of January, 1946, he, the said Clarence C. Caminos, being then and there an executive officer, to wit, a duly commissioned, appointed and acting police officer of the Police Department of the City and County of Honolulu, Territory aforesaid, in disregard of his office as a police officer, and perverting the trust reposed in him, and for the private gain of him, the said Clarence C. Caminos,

under color of his office, did, unlawfully, corruptly, wilfully and feloniously take, accept and receive of one Paul Au, then and there being, the sum of Two Thousand One Hundred Dollars (\$2,100.00), in money, a more particular description of which is to the Grand Jury unknown, as a bribe, gift and gratuity under an agreement and with an understanding that he, the said Clarence C. Caminos, would not, in the exercise of his function in his capacity as a police officer aforesaid, apprehend and arrest the said Paul Au, and divers and sundry other persons, to the Grand Jury unknown, for conducting, carrying [12] on, playing and engaging in gambling and gambling games in the City and County of Honolulu, in violation of and prohibited by the laws of the Territory of Hawaii, which matter of the said apprehension and arrest was then and there pending and which might by law come and be brought before him, the said Clarence C. Caminos, in his official capacity aforesaid, and did then and there thereby commit the crime of receiving a bribe, contrary to the form of the statute in such case made and provided.

A true bill found this 26th day of February, A.D. 1947.

/s/ ARTHUR C. HILLIGER,  
Acting Foreman of the  
Grand Jury.

/s/ EDWARD N. SYLVA,  
Special Assistant Public Prosecutor of the City and  
County of Honolulu.

[Endorsed]: Filed February 26, 1947. [13]

[Title of Circuit Court and Cause.]

C - 19015

CLERK'S MINUTES

At Term: Saturday, March 1, 1947, at 10:00 a.m.

Present: Hon. W. C. Moore, Fourth Judge, Presiding.

Merle Uehling, Clerk.

Olaf Oswald, Reporter.

Edward Sylvia, Special Prosecutor.

Counsel: At request of O. P. Soares, Esq., his name entered as counsel for Defendant Caminos.

Continuance

Defendant handed a copy of the indictment. Case continued to March 3, 1947, for arraignment and plea.

By Order of the Court:

/s/ MERLE UEHLING,  
Clerk.

At Term: Monday, March 3, 1947, at 1:30 p.m.

Present: Hon. W. C. Moore, Fourth Judge, Presiding.

Merle Uehling, Clerk.

Lawrence Chaffee, Reporter.

Allen Hawkins, Esq., Asst. Public Prosecutor.

Counsel: Defendant in Person.



## Continuance

Withdrawal as counsel by Mr. O. P. Soares.

At request of Defendant and the Prosecution, case continued for arraignment and plea to March 7, 1947, at 1:30 p.m.

By Order of the Court:

/s/ MERLE UEHLING,  
Clerk.

At Term: Friday, March 7, 1947, at 1:30 p.m.

Present: Hon. W. C. Moore, Fourth Judge, Presiding.

Merle Uehling, Clerk.

Lawrence Chaffee, Reporter.

Counsel: Allen Hawkins, Esq., Asst. Public Prosecutor.

At Request of Attorneys Botts & Patterson, Their Names Entered as Counsel for Defendant Caminos.

Defendant, through Attorneys Botts & Patterson, waived reading of the indictment and consented to its entry in the words and terms of the original indictment. At request of counsel, case continued to March 21, 1947, for plea.

By Order of the Court:

/s/ MERLE UEHLING,  
Clerk. [14]



At Term: Tuesday, March 25th, 1947, 1:30 p.m.

Present: Hon. W. C. Moore, Fourth Judge Presiding.

Hazel G. McCraw, Clerk.

Arthur Perkins, Bailiff.

Reporter: Ruby Lynn, bk. 1, pgs. 36-47.

Counsel: Kenneth Young, Esq., Special Public Prosecutor.

Botts & Patterson Counsel for Defendant.

Defendant in Person.

Plea and Setting

Defendant in person with his counsel, and upon being asked by the Court his plea enters a plea of Not Guilty.

Case placed on the ready calendar for trial.

By Order of Court:

/s/ HAZEL G. McCRAW,  
Clerk. [15]

At Term: 1:30 p.m., Wednesday, April 16, 1947.

Present: Hon. A. M. Cristy, Second Judge Presiding.

M. K. Heine, Clerk.

Olaf Oswald, Reporter.

Counsel: Dudley Lewis, Esq., Asst. Attorney General.

Kenneth C. Young, Esq., Asst. Public Prosecutor.

Peter Lee, Esq., for Defendant.

Defendant in Person.

## SETTING

Mr. Patterson informed the Court that he and Mr. Botts are withdrawing as counsel for the defendant, which the Court noted and entered into the records.

Mr. Lee entered his appearance as counsel for the defendant which was duly noted and entered into the records.

Upon agreement by counsel for the prosecution and counsel for the defense, the Court set this cause for trial by jury on Monday, May 5, 1947, at 9:00 a.m., drawing of a jury panel set for Thursday morning, May 1st, at 8:30 a.m. The Court further stated that counsel should notify the Court by 8:30 a.m., May 1st, if there is a change in the trial of this matter before a jury and that any other changes should be made known to counsel and Court by Friday, April 25, 1947, 1:30 p.m.

By Order of the Court:

/s/ M. K. HEINE,  
Clerk.

At Term: 2:40 p.m., Friday, April 28, 1947.

Present: Hon. Albert M. Cristy, Second Judge,  
Presiding.

B. W. Griep, Clerk.

O. Oswald, Reporter.

Counsel: Same.

Motion for Bill of Particulars—Denied;

Motion for a Continuance—Granted;

Motion for Consolidation—Granted.

Mr. Lee presented argument in support of his motion for a Bill of Particulars.

Mr. Lewis argued against the motion.

The Court after hearing argument by counsel, ruled that the indictments contained sufficient information as to the date, time and place of the alleged transactions, and therefore denied the motion for a Bill of Particulars.

Mr. Lee next presented his motion for a continuance to the Court.

The Court granted the motion for a continuance and reset the date of trial to Monday, May 12th, 1947, at 9:00 a.m. and set down Thursday, May 8th, 1947, at 8:30 a.m. as the date the jury panel is to be drawn for the trial.

Mr. Lee presented his third and last motion—Motion for Consolidation of the cases in Cr. 19015 and Cr. 19018.

There being no objection by Prosecution, the Court ordered the consolidation of the two cases, and that they be tried together.

By Order of the Court:

/s/ B. GRIEP,

Clerk. [16]

At Term: Monday, May 12, 1947, 8:45 a.m.

Present: Hon. A. M. Cristy, Second Judge Presiding. ..

M. K. Heine, Clerk.

O. Oswald, Reporter.

Counsel: Dudley Lewis, Esq., Asst. Attorney General.

Kenneth C. Young, Esq., Asst. Public Prosecutor.

Peter Lee, Esq., for Defendant.

E. Beebe, Esq., for Defendant.

Fred Patterson, Esq., for Defendant.

Defendant in Person.

### Trial by Jury

8:45 a.m. The Clerk called the roll of jurors showing 21 present.

9:00 a.m. Counsel announced their readiness to proceed with this cause.

9:02 a.m. Mr. Beebe entered his appearance as associate counsel for the defendant.

9:03 a.m. Mr. Patterson entered his appearance as associate counsel for the defendant.

9:04 a.m. The Clerk called the case, and after counsel indicated that they were ready to proceed with this cause, the Court directed the Clerk to draw 12 names from the jury box. The following names were drawn:

1. J. A. Hazelrigg (275)
2. Ted T. Hangai (267)

3. Kam Y. Goo (243)
4. Walter T. Y. Ing (303)
5. Alvin J. Baptist (38)
6. Lee Allen Tumlinson (566)
7. Ambrose Hutchison (298)
8. A. B. Clark (129)
9. Henry H. K. Chang (114)
10. Louis C. Medeiros (379)
11. Henry Zatz (648)
12. Frank R. Girod (235)

9:05 a.m. The clerk swore the jurors present in the Court room as to their qualifications whereupon counsel for the prosecution and counsel for the defense examined the jurors for cause and passed all of them except Mr. Zatz.

11:26 a.m. Mr. Beebe challenged Mr. Zatz for cause and asked that he be excused.

11:27 a.m. The Court denied the request and asked counsel to reframe his questions to the juror. The Court allowed Mr. Beebe an exception.

11:45 a.m. Exercising his first peremptory challenge, Mr. Lewis excused Alvin J. Baptist, (38) who was excused by the Court until called, and in his place and stead was drawn

W. S. Willis (614) who was examined for cause by counsel on both sides and passed.

Exercising his first peremptory challenge, Mr. Lee excused Henry Zatz (648) and in his place and stead was drawn

Marcus R. Colburn, Jr. (137) who was examined for cause by counsel on both sides and passed.



Exercising his second peremptory challenge, Mr. Lewis excused Marcus R. Colburn, Jr., who was excused by the Court until called, and in his place and stead was drawn

Richard W. T. Lee (352) who was examined for cause by counsel on both sides and passed.

Exercising his second peremptory challenge, Mr. Lee excused Frank R. Girod (235) and in his place and stead was drawn

Joseph A. Byrom (94).

12:05 p.m. Mr. Beebe moved that the jury be excused on the grounds recorded by the court reporter.

12:06 p.m. The Court denied the motion and stated that counsel would be entitled to three challenges each; and that further it was counsel for the defense who had requested that Cr. Nos. 19015 and 19018 be consolidated for trial thereby allowing only three challenges each for counsel.

12:07 p.m. Court called recess until 1:30 p.m. this afternoon.

1:30 p.m. Joseph A. Byrom was examined for cause by counsel on both sides and passed.

Exercising his third peremptory challenge, Mr. Young excused Louis C. Medeiros (379) and in his place and stead was drawn [17]

A. J. Duarte (184) who was examined for cause by counsel on both sides and passed.

Exercising his third peremptory challenge, Mr. Patterson excused W. S. Willis (614) and in his place and stead was drawn

William C. Bruhn (80) who was examined for cause by counsel on both sides and passed.

2:00 p.m. Mr. Patterson renewed defense counsel's objections to the Court's ruling that counsel would have three challenges apiece in this cause. The Court informed counsel that his former ruling would still stand and that counsel would be allowed an exception.

2:05 p.m. The clerk swore in the following jurors to try the case:

1. J. A. Hazelrigg (275)
2. Ted T. Hangai (267)
3. Kam Y. Goo (243)
4. Walter T. Y. Ing (303)
5. William C. Bruhn (80)
6. Lee Allen Tomlinson (566)
7. Ambrose Hutchison (398)
8. A. B. Clark (129)
9. Henry H. K. Chang (114)
10. A. J. Duarte (184)
11. Richard W. T. Lee (352)
12. Joseph A. Byrom (94)

The Court excused the remaining jurors in the court room until called.

2:07 p.m. Court adjourned until 9:00 a.m. tomorrow morning.

By Order of the Court:

/s/ M. K. HEINE,

Clerk.

At Term: Tuesday, May 13, 1947, 9:00 a.m.

Present: Hon. A. M. Cristy, Second Judge Presiding.

M. K. Heine, Clerk.

O. Oswald, Reporter.

Counsel: Same.

Robert B. Griffith (SWBC), Esq., for Defendant.

### Further Trial

9:00 a.m. Court and counsel indicated their readiness to proceed in the trial of this cause in the presence of the jury.

9:02 a.m. Mr. Lewis presented his opening statement to the jury.

9:19 a.m. The defense reserved its opening statement to the jury.

9:20 a.m. Axel E. Nelson (1), was called as a witness by Mr. Lewis, duly sworn and testified on direct examination.

Prosecution's Exhibit "A" (In Evidence):

Oath of Office, Police Department, City and County of Honolulu, Territory of Hawaii, signed by Clarence C. Caminos, dated Feb. 1, 1933; received and marked.

Prosecution's Exhibit "A-1" (For Identification): Personnel folder of Clarence C. Caminos with the Honolulu Police Department; received and marked.

9:28 a.m. Cross-examination by Mr. Patterson.



9:33 a.m. Redirect examination by Mr. Lewis.

9:35 a.m. Recross-examination by Mr. Patterson.

9:37 a.m. Carl B. Siebert (2), was called by Mr. Young as a witness; duly sworn and testified on direct examination.

Prosecution's Exhibit "B-1 to B-4" (In Evidence):  
Photographs (4), taken by Carl B. Siebert, Honolulu Police Department, of Paul Au's gambling rooms in the Honolulu Rooms; received and marked.

9:45 a.m. Cross-examination by Mr. Lee.

9:47 a.m. Alfred Richardson (3), was called by Mr. Lewis as a witness, duly sworn and testified on direct examination.

9:55 a.m. Redirect examination by Mr. Lee.

10:02 a.m. Redirect examination by Mr. Lewis.

10:05 a.m. Recross-examination by Mr. Lee.

10:07 a.m. Court called recess.

10:14 a.m. Court reconvened.

10:14 a.m. Joseph M. Scharsh (4), was called by Mr. Lewis as a witness, duly sworn and testified on direct examination.

10:22 a.m. Cross-examination by Mr. Patterson.

10:30 a.m. The Court ordered that all witnesses to be called by the prosecution or defense counsel leave the courtroom immediately; counsel thereupon removed from the courtroom all witnesses to be called.

10:55 a.m. Redirect examination by Mr. Lewis.

10:57 a.m. Recross-examination by Mr. Patterson.

Defendant's Exhibit "1, 2, 3, 4, 5, and 6" (In Evidence):

Six photographs taken by Carl B. Siebert, Hon. Police Department, of Paul Au's gambling rooms and dogs kept at the Honolulu Rooms; received and marked.

11:02 a.m. Court called recess.

11:10 a.m. Court and counsel met in chambers on an offer of proof by Mr. Patterson which was denied by the Court. Exception was allowed Mr. Patterson.

11:17 a.m. Court reconvened in the courtroom. Further re-cross-examination by Mr. Patterson.

11:19 a.m. Re redirect examination by Mr. Lewis.

Prosecution's Exhibits "B-5 and B-6" (In Evidence):

Two photographs taken by Carl B. Siebert, Hon. Police Department, of dogs at Paul Au's gambling rooms, Honolulu Rooms; received and marked.

11:22 a.m. Re recross-examination by Mr. Patterson.

11:26 a.m. Kam Yin Ching (5), was called by Mr. Lewis as a witness, duly sworn and testified on direct examination.

11:35 a.m. Cross-examination by Mr. Lee.

11:52 a.m. Redirect examination by Mr. Lewis.

Prosecution's Exhibits "B-7":

Photograph taken by Carl Siebert at the Honolulu Rooms showing Annabelle Damon, newspaper reporter, Chief Wm. Gabrielson, and Robert Kennedy, Hon. Police Dept.; received and marked.

11:55 a.m. Court adjourned until 9:00 a.m., tomorrow morning for further trial. ..

By Order of the Court:

/s/ M. K. HEINE,

Clerk.

At Term: Wednesday, May 14, 1947, 9:00 a.m.

Present: Hon. A. M. Cristy, Second Judge Presiding.

M. K. Heine, Clerk.

O. Oswald, Reporter.

Counsel: Same.

### Further Trial

9:00 a.m. Counsel indicated their readiness to proceed with the trial and the Court noted the presence of the jury.

9:02 a.m. Paul Au (6), was called by Mr. Lewis as a witness, duly sworn and testified on direct examination.

9:40 a.m. Mr. Patterson moved that the Court, jury and counsel visit the Honolulu Rooms, scene of gambling, and continue the witness' testimony there.

9:42 a.m. Mr. Lewis argued on the motion.

9:43 a.m. The Court denied the motion. [19]

9:44 a.m. Further direct examination by Mr. Lewis.

9:50 a.m. Mr. Patterson moved to strike certain testimony of Mr. Au.

9:51 a.m. The Court denied the motion.

9:52 a.m. The Court instructed the jury not to regard the arguments between Court and counsel and between counsel and further not to hold this against the defendant.

10:00 a.m. Court called recess.

10:07 a.m. Court reconvened. Further direct examination by Mr. Lewis.

10:15 a.m. Mr. Lee moved to strike all the testimony presented by Mr. Au in reference to payments on various dates to Mr. Wm. Clark and stated his grounds for same.

10:17 a.m. The Court denied the motion and allowed counsel an exception.

10:18 a.m. Cross-examination by Mr. Patterson.

10:56 a.m. Court called recess.

11:01 a.m. Court reconvened. Further cross-examination by Mr. Patterson.

11:53 a.m. Redirect examination by Mr. Lewis.

11:59 a.m. Court recessed until 2:00 p.m.

By Order of the Court:

/s/ M. K. HEINE,

Clerk.

2:00 p.m. Court reconvened.

The stated for the record, the presence of the jury and counsel.

Paul Au resumed the stand on further re-direct examination by Mr. Lewis.

2:08 p.m. Magdaline Yu (7), was called as a witness by prosecution, duly sworn and testified on direct examination by Mr. K. Young.

2:15 p.m. Cross-examination by Mr. Lee.

2:26 p.m. William Clark (8), was called as a witness for Prosecution, duly sworn and testified on direct examination by Mr. Lewis.

2:59 p.m. Court called a recess.

3:05 p.m. Court reconvened.

William Clark resumed the stand on further direct examination by Mr. Lewis.

3:10 p.m. Cross-examination by Mr. Lee.

4:00 p.m. Court stated that the further trial of this case would be resumed tomorrow morning at 9 o'clock—5/15/47—and adjourned.

By Order of the Court:

/s/ B. GRIEP,

Clerk.

At Term: Thursday, May 15, 1947, 9:00 a.m.

Present: Hon. A. M. Cristy, Second Judge Presiding.

M. K. Heine, Clerk.

O. Oswald, Reporter.

Counsel: Same.



## Further Trial

9:00 a.m. William Clark resumed the stand on further cross-examination by Mr. Lee.

9:08 a.m. Re-direct examination by Mr. Lewis.

9:10 a.m. Mr. Patterson moved to strike the answer of the witness for the reason recorded by the Court reporter.

9:13 a.m. The Court denied the motion and allowed counsel an exception.

9:23 a.m. Recross-examination by Mr. Patterson.

9:25 a.m. Further recross-examination by Mr. Lee.

9:28 a.m. Re redirect examination by Mr. Lewis.

9:30 a.m. Thomas G. Rodenhurst (9), was called by Mr. Lewis as a witness, duly sworn and testified on direct examination.

9:37 a.m. Cross-examination by Mr. Patterson.

9:50 a.m. Redirect examination by Mr. Lewis.

9:55 a.m. Recross-examination by Mr. Patterson.

9:57 a.m. Court called recess.

10:05 a.m. Court reconvened. Further recross-examination by Mr. Patterson.

10:10 a.m. Mr. Patterson made an offer of proof to the Court which was denied and exception allowed counsel.

10:12 a.m. Re redirect examination by Mr. Lewis.

10:15 a.m. Lawrence Loo (10), was called by Mr. Lewis as a witness, duly sworn and testified on direct examination.

10:25 a.m. Cross-examination by Mr. Patterson.

11:02 a.m. Court called recess.

11:09 a.m. Court reconvened. Richard C. Miller (11), was called by Mr. Lewis as a witness, duly sworn and testified on direct examination.

11:16 a.m. Cross-examination by Mr. Patterson.

11:23 a.m. Court called recess.

11:30 a.m. Court and counsel met in chambers and Mr. Lee requested the Court's indulgence in having the prosecution produce the witness, Paul Au, for identification purposes tomorrow morning at 9:00 a.m.

11:31 a.m. The Court granted the request and ordered the prosecution to bring into Court Paul Au at 9:00 a.m. tomorrow morning.

11:40 a.m. Court reconvened in open court. The prosecution rested.

11:42 a.m. Court adjourned until 9:00 a.m. tomorrow morning.

By Order of the Court:

/s/ M. K. HEINE,

Clerk.

At Term: Friday, May 16, 1947, 9:00 a.m.

Present: Hon. A. M. Cristy, Second Judge Presiding.

M. K. Heine, Clerk.

O. Oswald, Reporter.

Counsel: Same.



## Further Trial

9:00 a.m. Court indicated the presence of counsel and jury.

9:02 a.m. Mr. Young stated that the Court take judicial notice of the calendar year 1945 and 1946 which the Court noted.

9:03 a.m. Mr. Patterson moved that the Court grant the defense a directed verdict on the grounds recorded by the Court reporter.

9:10 a.m. Mr. Lee presented to the Court a memorandum citing authorities supporting a directed verdict for the defense.

9:15 a.m. The Court denied the motion on the grounds recorded by the Court reporter.

9:17 a.m. Ruth Caminos Walea (12), was called by Mr. Lee as a witness, duly sworn and testified on direct examination.

9:25 a.m. Cross-examination by Mr. Lewis.

9:27 a.m. Leilani Fuller (13), was called by Mr. Lee as a witness, duly sworn and testified on direct examination.

9:35 a.m. Cross-examination by Mr. Lewis.

9:37 a.m. Redirect examination by Mr. Lee.

9:39 a.m. Capt. Dewey Mookini was called three times by the Court Bailiff, Joseph Munson, for the defense but without response.

9:40 a.m. See Gun Wong (14), was called by Mr. Lee as a witness, duly sworn and testified on direct examination.

9:47 a.m. The Court denied the offer of proof of Mr. Lee.

9:50 a.m. The Court granted counsel for the defense the right to continue direct examination of the witness, See Gun Wong, on Monday morning when Mr. Ching is produced in Court at 9:00 a.m.

9:52 a.m. Mr. Lewis reserved the right to cross-examine this witness after the defense has completed their direct examination of this witness on Monday morning. The Court granted the reservation.

9:55 a.m. Capt. Dewey Mookini (15), was called by Mr. Lee as a witness, duly sworn and testified on direct examination.

10:05 a.m. Court called recess.

10:12 a.m. Court reconvened. Further direct examination by Mr. Lee.

10:15 a.m. Cross-examination by Mr. Lewis.

10:17 a.m. Redirect examination by Mr. Lee.

10:18 a.m. Re redirect examination by Mr. Patterson.

10:22 a.m. Re recross-examination by Mr. Lawis.

10:24 a.m. George Hasegawa (16), was called by Mr. Lee as a witness, duly sworn and testified on direct examination.

10:26 a.m. Mr. Hasegawa was excused from the courtroom temporarily by Mr. Lee and Mrs. Ruth Walea was called to the stand for the purpose of identifying Paul Au who was also present in the courtroom.

10:28 a.m. Mrs. Leilani Fuller was called to the stand for the purpose of identifying Paul Au who was present in the courtroom.

10:30 a.m. George Hasegawa was called back to

the stand on further direct examination by Mr. Lee.

10:32 a.m. No cross-examination.

10:33 a.m. Robert Kinsley (17), was called by Mr. Patterson as a witness, duly sworn and testified on direct examination.

11:00 a.m. Court called recess.

11:05 a.m. Court and counsel met in chambers and Mr. Patterson presented his offer of proof on the grounds recorded by the Court reporter.

11:12 a.m. Mr. Lewis argued.

11:15 a.m. The Court outlined three points on which Mr. Patterson's offer of proof was presented and granted the first which is recorded by the Court reporter. The Court denied the second and third points and allowed counsel for the defense an exception.

11:30 a.m. Court and counsel reconvened in open court.

11:31 a.m. Further direct examination by Mr. Patterson.

11:33 a.m. Cross-examination by Mr. Lewis.

11:34 a.m. Louis Paresa (18), was called by Mr. Patterson as a witness, duly sworn and testified on direct examination.

12:05 a.m. Court adjourned until Monday, May 19, 1947, at 9:00 a.m. for further trial in this cause.

By Order of The Court:

/s/ M. K. HEINE,  
Clerk.

At Term: Monday, May 19, 1947, 9:00 a.m.

Present: Hon. A. M. Cristy, Second Judge  
Presiding.

M. K. Heine, Clerk.

O. Oswald, Reporter.

Counsel: Same.

### Further Trial

9:00 a.m. The Court indicated the presence of counsel and jury.

9:02 a.m. Mr. Patterson petitioned the Court's approval on a visitation to the Honolulu Rooms by Court, counsel and the jury.

9:03 a.m. Mr. Lewis argued on the matter.

9:06 a.m. Mr. Patterson argued further.

9:07 a.m. The Court stated it would not rule on this matter at present, but would go into the issues of it during recess.

9:07 a.m. Louis Paresa was recalled to the stand by Mr. Patterson on further direct examination.

9:21 a.m. Cross-examination by Mr. Lewis.

9:23 a.m. Kam Yin Ching was recalled to the stand by Mr. Lee on further cross-examination.

9:25 a.m. See Gun Wong was called into the courtroom for identification by the witness.

9:40 a.m. See Gun Wong was recalled by Mr. Lee on further direct examination.

9:45 a.m. Cross-examination by Mr. Lewis.

9:50 a.m. Re direct examination by Mr. Lee.

9:51 a.m. Harry Hosoi (19), was called by Mr. Lee as a witness, duly sworn and testified on direct examination.

9:53 a.m. The Court informed counsel and the jury that he had been requested by Mr. O. P. Soares, counsel for this witness in another case, and who was unable to be present in Court this morning, to inform the witness of his constitutional rights. Thereupon the Court [22] proceeded to inform the witness of his constitutional rights.

9:54 a.m. Mr. Patterson petitioned that the witness be granted immunity if he so testified for the defense as other witnesses of the prosecution had been promised.

9:55 a.m. The Court denied the request and excused the witness.

10:05 a.m. Court called recess.

10:10 a.m. Court and counsel met in chambers and Mr. Patterson renewed his request that the Court, counsel and jury visit the Honolulu Rooms, and further stated that the defense would pay all expenses connected with this excursion.

10:18 a.m. Mr. Young argued on the petition.

10:20 a.m. The Court granted the request and stated that visitation to the Honolulu Rooms would be set for this afternoon at 1:30 p.m. by bus, if one is available.

10:30 a.m. Court reconvened in open court.

10:31 a.m. Judge Harry Steiner (20), was called by Mr. Patterson as a witness and testified on direct examination after both counsel waived the oath.

10:33 a.m. Mr. Patterson was denied by the Court the introduction of an exhibit in evidence for the defense.

10:35 a.m. Mr. Young moved to strike the testi-



mony of the witness, Harry Steiner, pertaining to a case which came up before him in the District Court of Honolulu.

10:36 a.m. The Court granted the motion to strike.

10:40 a.m. No cross-examination.

10:42 a.m. Theodore H. Murray (21), was called by Mr. Patterson as a witness, duly sworn and testified on direct examination.

Defendant's Exhibit "7" (In Evidence):

Leather dog collar about 2" wide with metal buckle and ring attached; received and marked.

11:07 a.m. Cross-examination by Mr. Lewis.

11:44 a.m. Court called a recess until 1:30 p.m. this afternoon.

By Order of The Court:

/s/ M. K. HEINE,

Clerk.

1:30 p.m. Court reconvened.

The Court stated that the Court, jury, Counsel, Bailiff, reporter, Clerk and defendant would proceed to the Honolulu Rooms at Beretania and Aala Streets via H.R.T. Bus which is now waiting in front of the judiciary building, to inspect the premises.

1:32 p.m. Court adjourned to proceed to the Honolulu Rooms for the above mentioned inspection.

1:45 p.m. Court and jury arrived at 347-351 N. Beretania St., a dry goods store, and began inspec-

tion of the premises. Court and Jury then proceeded to 347-A & B, the same being the Honolulu Rooms and started an inspection of the entire premises—a 2 story frame building—A detail description of all rooms, doorways, fixtures and furnishings, and exits was read into the record by the Court and the same recorded by Court Reporter O. Oswald.

2:42 p.m. Court, jury and counsel arrived back at the Court House.

Immediately upon arrival at the Courthouse, the Court called a five minute recess.

2:50 p.m. Court, jury and Counsel reconvened in the Courtroom to resume further trial of this case.

Father Ernest Claes (22), Roman Catholic priest from Kahuku Parish, was called as a defense and character witness, duly sworn and testified on direct examination by Mr. Lee.

2:54 p.m. George Kinney (23), was called by defense as a character witness, duly sworn and testified on direct examination by Mr. Lee.

2:59 p.m. Edward J. Burns (24), was called by the defense as a character witness, duly sworn and testified on direct examination by Mr. Patterson.

3:02 p.m. Sanford Parker (25), was called by the defense as a character witness, duly sworn and testified on direct examination by Mr. Lee.

3:06 p.m. Court called a recess until 9:00 a.m. tomorrow morning, at which time further trial of this case would be resumed.

By Order of The Court:

/s/ B. GRIEP,  
Clerk. [23]



At Term: Tuesday, May 20, 1947, 9:00 a.m.

Present: Hon. A. M. Cristy, Second Judge  
Presiding.

M. K. Heine, Clerk.

O. Oswald, Reporter.

Counsel: Same.

### Further Trial

9:05 a.m. The Court indicated the presence of counsel, defendant and jury.

9:06 a.m. Ernest Moses (26), was called as a witness by Mr. Patterson, duly sworn and testified on direct examination.

9:25 a.m. Mr. Lewis moved to strike certain testimony of Ernest Moses.

9:26 a.m. The Court granted the motion.

9:29 a.m. Cross-examination by Mr. Lewis.

9:44 a.m. Upon Mr. Patterson's request, the Court instructed the jury to disregard comments between attorneys and between Court and counsel.

9:45 a.m. Re direct examination by Mr. Patterson.

9:56 a.m. Re cross-examination by Mr. Lewis.

9:58 a.m. Re re direct examination by Mr. Patterson.

10:00 a.m. Court called recess.

10:09 a.m. Court reconvened. William Alsup Cleghorn (27), was called as a character witness by Mr. Patterson, duly sworn and testified on direct examination.

10:13 a.m. No cross-examination by the prosecution.

10:14 a.m. Capt. Van Kurin was called three times by the Court Officer, Joseph K. Munson, for the defense without response.

10:15 a.m. Robert K. Nishida (28), was called as a witness by Mr. Patterson, duly sworn and testified on direct examination.

10:33 a.m. Cross-examination by Mr. Lewis.

10:45 a.m. Re direct examination by Mr. Patterson.

10:46 a.m. Theodore F. Nobriga (29), was called as a witness by Mr. Lee, duly sworn and testified on direct examination.

10:54 a.m. No cross-examination by prosecution.

10:55 a.m. William Hoopai, Chief of Police (30), was called by Mr. Patterson as a witness, duly sworn and testified on direct examination.

11:05 a.m. Court called recess.

11:12 a.m. Court reconvened. Further direct examination by Mr. Patterson.

11:15 a.m. Cross-examination by Mr. Lewis.

11:23 a.m. Re direct examination by Mr. Patterson.

11:25 a.m. Mr. Lewis moved to strike certain testimony of William Hoopai which was granted by the Court and exception allowed Mr. Patterson.

11:30 a.m. Court to witness.

11:32 a.m. Further re direct examination by Mr. Patterson.

11:33 a.m. Carl Seibert (31) was called by Mr. Patterson as a witness, previously sworn, and testified on direct examination.

11:40 a.m. Cross-examination by Mr. Lewis.

11:47 a.m. Re direct examination by Mr. Patterson.

11:50 a.m. Re cross-examination by Mr. Lewis.

11:52 a.m. Re re direct examination by Mr. Patterson.

11:53 a.m. Capt. Walter Larsen (32), was called by Mr. Patterson as a witness, duly sworn, but did not testify.

11:54 a.m. Mr. Griffith informed the Court he has been retained by this witness in another case and objected to his testifying at this time. Mr. Griffith further requested that the Court inform him of his constitutional rights.

11:55 a.m. The Court informed Walter Larsen of his constitutional rights and excused him after he indicated he did not wish to testify.

11:56 a.m. Sidney R. Gatton (33), was called as a character witness by Mr. Lee, duly sworn and testified on direct examination.

11:57 a.m. Cross-examination by Mr. Lewis.

11:59 a.m. Lawrence Kunahisa (34), was called as a character witness by Mr. Lee, duly sworn and testified on direct examination.

12:00 m. No cross-examination by the prosecution.

12:02 p.m. Court adjourned until 9:00 a.m. tomorrow morning.

By Order of The Court:

/s/ M. K. HEINE,

Clerk. [24]

At Term: 9:00 a.m., Wednesday, May 21, 1947.

Present: Hon. Albert M. Cristy, Second  
Judge, Presiding.

B. W. Griep, Clerk.

O. Oswald, Reporter.

Counsel: J. Esposito, Esq.;  
D. Lewis, Esq., &  
Ken. Young, Esq.,  
For Prosecution.

Fred Patterson, Esq.;  
Peter Lee, Esq., &  
R. Griffith, Esq., (SWBC),  
For Defendant.

Defendant In Person.

### Further Jury Trial

The Court stated for the record that the Jury and counsel are present.

Mr. Lee stated that Mr. Griffith associate counsel for defendant was not able to attend the trial this morning.

9:03 a.m. Donald Marshall (35), was called by Mr. Patterson as a character witness, duly sworn and testified on direct examination.

9:10 a.m. Cross-examination by Mr. Lewis.

9:31 a.m. Re direct examination by Mr. Patterson.

9:33 a.m. Clarence C. Caminos (36), was called to the stand by Mr. Patterson, duly sworn and testified on direct examination.

9:54 a.m. Court called a recess.

10:21 a.m. Court reconvened.

Clarence C. Caminos resumed the stand on further direct examination.

11:01 a.m. Court called a recess.

11:08 a.m. Court reconvened.

It was stipulated by and between counsel that the evidence may show that from the time of Wm. Clark's suspension from the Hon. Police Dept. to the time the (his) deposit box was opened, it was guarded by Territorial and Federal officials; that at the time the box was opened for inspection of its contents, there was found in the same, cash in the sum of \$136,000.00 to \$140,000.00 and bonds, and that during such opening of the box the same was guarded by Territorial and Federal Tax officials and that Mr. Clarke was not able to touch the safety deposit box during all the above mentioned time.

Clarence C. Caminos resumed the stand on further direct examination by Mr. Patterson.

12:01 p.m. Court called a recess until 2:00 p.m. this afternoon.

By Order of The Court:

/s/ B. GRIEP,

Clerk.

2:00 p.m. The Court indicated the presence of counsel, defendant and jury.

2:02 p.m. Further direct examination by Mr. Patterson of the witness Clarence C. Caminos.

2:05 p.m. Cross-examination by Mr. Lewis.



3:05 p.m. Court called recess.

3:12 p.m. Court reconvened. Further cross-examination by Mr. Lewis.

3:58 p.m. Mr. Lewis moved to strike certain testimony of the witness which was granted by the Court.

4:00 p.m. Court adjourned until 9:00 a.m., tomorrow morning.

By Order of The Court:

/s/ M. K. HEINE,

Clerk. [25]

At Term: 9:00 a.m., Thursday, May 22, 1947.

Present: Hon. Albert M. Cristy, Second Judge  
Presiding.

B. W. Griep, Clerk.

O. Oswald, Reporter.

Counsel: Same.

### Further Jury Trial

9:00 a.m. The Court stated for the record that the jury and counsel were present.

Clarence C. Caminos resumed the stand on further cross-examination by Mr. Lewis.

Prosecution's Exhibit C-1 to C-5 Included:

Hon. Police Dept. vouchers as follows: 1/18/46 received \$52.00 from Capt. Caminos by H. L. Lastimoza; 3/15/46 paid \$22.50 to H. L. Lastimoza by Capt. Caminos; 12/21/45 payment of

\$21.50 to H. L. Lastimoza by Capt. Caminos; 10/6/45 paid to H. L. Lastimoza sum of \$32.00 by Capt. Caminos; 9/26/45 paid sum of \$15.00 to H. L. Lastimoza by Capt. Caminos; received in evidence and marked, over objection of Counsel for defendant.

9:43 a.m. Court recessed.

9:52 a.m. Court reconvened.

Clarence C. Caminos resumed the stand on further cross-examination by Mr. Lewis.

Prosecution's Exhibit "D":

Folio of 84 vouchers made out by the Honolulu Police Dept. on account of Evidence and Expense and Incidentals; received in evidence over objection of defense counsel, and marked.

10:50 a.m. Court called a recess.

11:00 a.m. Court reconvened.

Clarence C. Caminos resumed the stand on further cross-examination by Mr. Lewis.

11:16 a.m. Re direct examination by Mr. Patterson.

Defendant's Exhibit "8" (In Evidence):

Copy of Hon. Police Dept. voucher, dated 10/6/45, showing payment of \$50.00 to Alex Brown by Capt. Caminos; received in evidence and marked.

Defendant's Exhibit "9" (In Evidence):

Copy of Hon. Police Dept. voucher, dated 10/8/45 showing payment of \$80.00; received in evidence and marked.



Defendant's Exhibit "10" (In Evidence):

Copy of Hon. Police Dept. voucher, dated 12/21/45, showing payment of \$21.50; received in evidence and marked.

Defendant's Exhibit "11" (In Evidence):

Copy of Hon. Police Dept. voucher, dated 10/6/45, showing payment of \$32.00; received in evidence and marked.

Defendant's Exhibit "12" (In Evidence):

Copy of Hon. Police Dept. voucher, dated 1/18/46, received in evidence and marked.

Defendant's Exhibit "13" (In Evidence):

Copy of Hon. Police Dept. voucher, dated 3/15/46, showing payment of \$22.50; received in evidence and marked.

12:06 p.m. Court continued the further trial of this case until 9:00 a.m. tomorrow morning and adjourned.

By Order of The Court:

/s/ B. GRIEP,

Clerk. [26]

At Term: 9:00 a.m., Friday, May 23, 1947.

Present: Hon. Albert M. Cristy, Second Judge  
Presiding.

B. W. Griep, Clerk.

O. Oswald, Reporter.

Counsel: Same.

Further Jury Trial

9:00 a.m. Mr. Lewis stated for the record that the jury and counsel were present.

Clarence C. Caminos resumed the stand on further re-direct examination by Mr. Patterson.

9:04 a.m. Re-cross-examination.

9:17 a.m. Leon M. Straus (37), Captain, Detective Div., Hon. Police Dept., was called as a defense witness, duly sworn and testified on direct examination by Mr. Patterson.

9:23 a.m. Defense rested. The Court allowed Mr. Lee's request that the defense be allowed to reopen their case.

Clarence S. H. Au (38), was called as a defense witness, duly sworn and testified. Mr. Clarence Au stated that he refuses to give any testimony on the ground that he is at present under an indictment. Mr. Au further stated that testimony given by him at this time might incriminate him and that he stood by his constitutional rights in not giving any testimony at this time.

The Court permitted Mr. Au to leave the stand.

9:35 a.m. Mr. Lee announced that the defense now re-rests its case.

9:36 a.m. Richard Kazou Mikami (39), was called as a witness for prosecution, duly sworn and testified on direct examination by Mr. Lewis.

10:22 a.m. Court called a recess.

10:32 a.m. Richard Kazuo Mikami resumed the stand on further direct examination by Mr. Lewis.

Prosecution's Exhibit "E" (For Identification):

Statement made by Richard Kazuo Mikami in the Public Prosecutor's Office on April 3, 1946, at 2:55 p.m. to J. Jardine and recorded in shorthand and transcribed by Kathleen Jarrett; received for identification and marked.

11:06 a.m. Cross-examination by Mr. Patterson.

11:08 a.m. Court called a recess.

11:17 a.m. Court reconvened.

Mr. Peter Lee, associate counsel for defendant, moved to strike the entire testimony of Richard Kazuo Mikami and stated the grounds for the same.

The Court denied the motion to strike the entire testimony of Richard Kazuo Mikami and allowed the exception noted by Mr. Lee.

11:18 a.m. Kathleen Rego also known as Kathleen Jarrett (40), was called to the stand by Prosecution, duly sworn and testified on direct examination by Mr. K. Young.

The Court stated that only those portions of the statement made by Richard K. Mikami, tentatively marked for identification as Prosecution's Exhibit "E," that the said Mr. Mikami does not recall having been asked him and answers he does not recall giving, would be admitted in evidence.

11:28 a.m. Court called a recess.

11:40 a.m. Court reconvened.

Prosecution stated that Richard Kazuo Mikami had pointed out all questions and answers on statement marked for identification as Prosecution's Exhibit "E" and that the same were checked off

with a red pencil as being prior inconsistent statements, that the same have been numbered from 1 to 16 included, that the same would be typed on a separate sheet and introduced in evidence.

There was no objection by Counsel for defendant.

11:44 a.m. Kathleen Rego, also known as Kathleen Jarrett, resumed the stand on cross-examination by Mr. Patterson.

11:45 a.m. Jose Tantog (41) was called as a witness for Prosecution, duly sworn and testified on direct examination by Mr. Lewis.

11:55 a.m. Court called a recess until 2:00 p.m. this afternoon.

By Order of The Court:

/s/ B. GRIEP,

Clerk. [27]

2:00 p.m. Jose Tantog was recalled to the stand by Mr. Lewis on further direct examination.

2:21 p.m. Cross-examination by Mr. Patterson.

2:32 p.m. Re direct examination by Mr. Lewis.

2:35 p.m. Re cross-examination by Mr. Patterson.

2:43 p.m. Catalino Proprios (42) was called by Mr. Young as a witness, duly sworn and testified on direct examination.

2:49 p.m. Cross-examination by Mr. Patterson.

3:00 p.m. Court called recess.

3:06 p.m. Court reconvened. Further cross-examination by Mr. Patterson.

3:07 p.m. Re direct examination by Mr. Young.  
Prosecution's Exhibit "F" (In Evidence: (Over and above objection of Counsel for Defense) Excerpts of the statement of Richard Kazuo Mikami made in the Public Prosecutor's Office on April 3, 1946, at 2:55 o'clock p.m., to J. Jardine and recorded in shorthand and transcribed by Kathleen Jarrett; received and marked.

3:15 p.m. Mrs. Kathleen Rego was called to the stand by Mr. Lewis and queried by the Court.

3:21 p.m. Counsel for the prosecution rested.

3:22 p.m. Court adjourned until 8:30 a.m., Monday morning, May 26, 1947, but the Court instructed counsel to meet in chambers tomorrow morning at 9:30 a.m. for settlement of instructions.

By Order of The Court:

/s/ M. K. HEINE,

Clerk.

At Term: 9:30 a.m., Saturday, May 24, 1947.

Present: Hon. A. M. Cristy, Second Judge  
Presiding.

M. K. Heine, Clerk.

O. Oswald, Reporter.

Counsel: Same.

#### Settlement of Instructions

Court and counsel met in chambers for the settlement of instructions of the prosecution and defense.



Prosecution's Instructions:

1. Given over objection.
2. Given as amended by agreement as to form.
3. Given as amended over objection.
4. Given as amended over objection.
5. Given as amended over objection.
6. Given over objection.
7. Given as amended over objection.
8. Given over objection.
9. Given over objection.
10. Given over objection.
11. Given by agreement as to form.
12. Given over objection.
13. Given over objection.
14. Given over objection.
- 14A. Given over objection.
15. Withdrawn.

Defendant's Instructions:

1. Refused.
2. Refused as covered.
3. Given over objection.
4. Given by agreement.
5. Given by agreement.
6. Refused as presented, but given as amended.
- 6A. Given over objection.
7. Given as amended over objection.
8. Given over objection.
9. Given by agreement.
10. Refused as drawn and given as amended.
- 10A. Given by agreement.



11. Given by agreement.
12. Given as amended by agreement.
13. Refused as drawn.
- 13A. Given as an amendment of No. 13  
by agreement.
14. Refused by the Court.
15. Given as amended by agreement.
16. Given over objection.
17. Refused as drawn and given as amended  
in No. 17A.
- 17A. Given as amended over objection.
18. Withdrawn.
19. Withdrawn.
20. Given as amended over objection.
21. Refused as covered.
22. Given by agreement.
23. Refused.
24. Refused.
25. Given by agreement.
26. Refused.
27. Refused as argumentative.

Court and counsel adjourned until Monday, May 26, 1947, at 8:30 a.m., for further trial of this case.

By Order of The Court:

/s/ M. K. HEINE,

Clerk.

At Term: 8:30 a.m., Monday, May 26, 1947.

Present: Hon. A. M. Cristy, Second Judge  
Presiding.

M. K. Heine, Clerk.

O. Oswald, Reporter.

Counsel: Same.

### Further Trial

8:35 a.m. Court indicated the presence of counsel, defendant and the jury.

8:37 a.m. Clarence C. Caminos was recalled by Mr. Patterson to the stand on further direct examination.

8:42 a.m. Further cross-examination by Mr. Lewis.

8:45 a.m. Re direct examination by Mr. Patterson.

8:47 a.m. Counsel stipulated that according to the records of the Honolulu Police Department, the defendant was transferred to District 3 on January 1, 1943, and appointed lieutenant in charge of the Ewa-Waianae District.

8:48 a.m. Harry F. Chun (43) was called as a witness by Mr. Patterson, duly sworn and testified on direct examination.

8:50 a.m. Cross-examination by Mr. Young.

8:53 a.m. Re direct examination by Mr. Patterson.

8:54 a.m. Counsel for the defense rested.

8:55 a.m. Court called a recess.

9:15 a.m. Court and counsel met in chambers.

Mr. Patterson presented his objections to Mr. Esposito arguing on the case for the prosecution as he had not been present during the earlier part of the trial. Mr. Patterson further stated that arguments for both defense and prosecution should be limited by the Court.

9:17 a.m. The Court ruled that Mr. Esposito would be allowed to argue only on that phase of the case in which he had been present and limited argument on both sides to two hours each.

9:20 a.m. Court reconvened in open court. Mr. Lewis presented his opening argument to the jury.

10:40 a.m. Court called recess.

(L. T. Chaffee substituted for O. Oswald, Repr.)

10:45 a.m. Court reconvened. Mr. Lee presented his opening argument to the jury for the defense.

11:12 a.m. The Court recessed until 12:30 p.m. this afternoon when further trial of this case will be resumed. The jury was escorted to lunch by the Court Bailiff, Joseph K. Munson, and the Clerk of the Court, Benjamin Griep.

By Order of The Court:

/s/ M. K. HEINE,

Clerk. [29]

At Term: 12:25 p.m., Monday, May 26, 1947.

Present: Hon. Albert M. Cristy, Second Judge,  
Presiding.

B. W. Griep, Clerk.

O. Oswald, Reporter.

Counsel: Same.

### Settlement of Instructions

12:25 p.m. Court and Counsel convened in chambers to consider Defendant's Instruction No. 27.

The Court refused Defendant's Instruction No. 27 on the ground that it was argumentative.

Mr. Patterson noted an exception to the Court's refusal to allow the above instruction, together with the Court's remarks concerning said refusal.

The Court allowed the exception by Mr. Patterson. The Court further stated that the remarks concerning the refusal of Defendant's Instruction No. 27, made by the Court, were made outside of the presence of the jury.

12:30 p.m. Court recessed.

12:35 p.m. Court reconvened in open Court.

Mr. Patterson presented further argument for Defense.

2:16 p.m. Mr. Patterson concluded his argument for defense.

Court recessed.

2:23 p.m. Court reconvened. Mr. L. T. Chaffee replaced Mr. O. Oswald as court reporter.

Mr. Kenneth Young presented Prosecution's closing argument.

2:33 p.m. Mr. Joseph Esposito presented Prosecution's closing argument.

3:03 p.m. Mr. Esposito concluded Prosecution's closing argument.

The Court read the instructions to the jury.

3:37 p.m. Court concluded reading the instructions to the jury.

Mr. Patterson noted an exception to the Court's refusal to give Defendant's Instructions Nos. 1, 2, 13, 14, 21, 23, 24, 26 and 27; also those of Defendant's instructions which were amended before being given by the Court. Mr. Patterson also noted an exception to the Court's giving of Prosecution's Instructions Nos. 1 to 15 included.

3:40 p.m. The jury retired to deliberate on their verdict.

5:46 p.m. The jury came out of deliberation to seek more information from the Court on Defendant's Instruction No. 22.

Court, counsel and jury convened in open court with O. Oswald as Court reporter.

The Court after elaborating on points raised by the jury in Defendant's Instructions No. 22, ordered the jury to go to supper and upon their return from supper, to retire to the jury room and further deliberate on their verdict.

5:50 p.m. Court adjourned.

7:10 p.m. The jury having returned from supper, retired to the jury room to deliberate on their verdict.

8:13 p.m. The jury, together with Court and Counsel convened in open Court at this time for the



reason that said jury requested that the testimony of Robert Kingsley and William Clark be read to them.

At the direction of the Court, Court Reporter O. Oswald, read from his shorthand notes the testimony given by Messrs. Kingsley and Clark.

8:33 p.m. Court adjourned and the jury resumed deliberation.

8:42 p.m. The jury announced that it had arrived at a verdict.

The Court, jury and counsel convened in open Court.

The Clerk read the following verdict:

We, the Jury in the above entitled cause find the defendant Clarence C. Caminos as to Cr. No. 19015:

Count I (on or about Aug. 18, 1945) Guilty.

Count II (on or about Aug. 25, 1945) Guilty.

Count III (on or about Sept. 2, 1945) Guilty.

Count IV (on or about Sept. 9, 1945) Guilty.

Count V (on or about Sept. 16, 1945) Guilty.

As to Cr. No. 19018:

Count I (on or about Jan. 6, 1946) Guilty.

Count II (on or about Jan. 13, 1946) Guilty.

/s/ A. R. CLARK,

Foreman.

Dated: Honolulu, T. H., May 26, 1947.

The Court ordered the verdict received and filed.

Mr. Patterson, counsel for defense called for a poll of the jurors.

The Court asked the jurors if any of them dis-



agreed with the verdict as read.

The jury indicated that they were all in favor of the verdict arrived at.

Mr. Patterson noted an exception to the verdict, gave notice of a motion for a new trial and of his intention to sue out a writ of error.

The Court continued the matter of sentence to June 6, 1947, Friday, at 2:00 p.m.

8:47 p.m. Court adjourned.

By Order of The Court:

/s/ B. GRIEP,

Clerk.

At Term: 2:00 p.m., Friday, June 6, 1947.

Present: Hon. Albert M. Cristy, Second Judge,  
Presiding.

B. W. Griep, Clerk,

O. Oswald, Reporter.

Counsel: Dudley Lewis, Esq., & K. Young, Esq.,  
Special Asst. Prosecutors.

Peter Lee, Esq., For Defendant.

Defendant in Person.

Motion for a New Trial—Denied—Sentence

Mr. Lee asked that the Court rule on the motion for a new trial at this time.

Mr. Lewis stated that he would submit the matter without argument.

The Court denied the motion for a new trial and allowed the exception by Mr. Lee.

The Court stated that upon the verdict of guilty

returned by the jury in this case in Cr. No. 19015 on all five counts, the Court finds the defendant guilty and sentences the defendant as follows:

Count I—Sentenced to serve a maximum term of five (5) years in Oahu Prison.

Count II—Sentenced to pay a fine of \$1000.00.

Count III—Sentenced to pay a fine of \$1000.00.

Count IV—Sentenced to pay a fine of \$1000.00.

Count V—Sentenced to pay a fine of \$1000.00.

As to Cr. No. 19018 the Court stated that upon the verdict of guilty returned by the jury on both counts, the Court finds the defendant guilty of said counts and sentences the defendant as follows:

Count I—Sentenced to serve a maximum term of five (5) years in Oahu Prison.

Count II—Sentenced to pay a fine of \$1000.00.

The Court ordered the prison sentences to run consecutively.

The Defendant was also charged with costs in both cases. [31]

Mr. Lee gave notice of an appeal by way of writ of error.

The Court stated that notice of appeal having been given by defendant, the mittimus is stayed for a period of 30 days.

The Court reset defendant's bail at \$5000.00, the same to cover either or both cases. The Court ordered that the bail be produced within 48 hours.

By Order of The Court:

/s/ B. GRIEP,

Clerk. [32]

[Title of Circuit Court and Cause.]

C-19018

### MINUTES OF THE CLERK

At Term: Saturday, March 1, 1947, at 10 a.m.

Present: Hon. W. C. Moore, Fourth Judge,  
Presiding.

Merle Uehling, Clerk.

Olaf Oswald, Reporter.

Counsel: Edward Sylvia, Esq., Special Prosecutor.

O. P. Soares, Esq., Counsel for Defendant.

### Continuance

Defendant handed copy of indictment. At request of counsel, case continued to March 3, 1947, at 1:30 p.m. for arraignment, plea and setting.

By Order of The Court:

/s/ MERLE UEHLING,

Clerk.

At Term: Monday, March 3, 1947, at 1:30 p.m.

Present: Hon. W. C. Moore, Fourth Judge,  
Presiding.

Merle Uehling, Clerk.

Lawrence Chaffee, Reporter.

Counsel: Allen Hawkins, Esq.,

Asst. Public Prosecutor.

O. P. Soares, Esq., Counsel for Defendant.

Withdrawal of Counsel and Continuance of Case

O. P. Soares, Esq., withdrew as counsel in this case. At request of Defendant and Prosecution, case continued for arraignment and plea to Friday, March 7, 1947, at 1:30 p.m.

By Order of The Court:

/s/ MERLE UEHLING,

Clerk.

At Term: Friday, March 7, 1947, at 1:30 p.m.

Present: Hon. W. C. Moore, Fourth Judge,  
Presiding.

Merle Uehling, Clerk.

Lawrence Chaffee, Reporter.

Counsel: Allen Hawkins, Esq.,

Asst. Public Prosecutor.

At Request of Attys. Botts & Patterson,  
Their Names Entered as Counsel for  
Defendant.

Arraignment

Defendant, through counsel, waived reading of the indictment and consented that it be entered in the words and terms of the original indictment. At request of counsel, case continued for plea to March 21, 1947, at 1:30 p.m.

By Order of The Court:

/s/ MERLE UEHLING,

Clerk. [33]

At Term: Tuesday, March 25th, 1947, 1:30 p.m.

Present: Hon. W. C. Moore, Fourth Judge,  
Presiding.

Hazel G. McCraw, Clerk.

Arthur Perkins, Bailiff.

Reporter: Ruby Lynn.

Counsel: Kenneth Young, Esq.,  
Special Public Prosecutor.  
Botts & Patterson for Defendant.  
Defendant in Person.

### Plea & Setting

Defendant in person with his counsel and upon being asked by the Court his plea enters a plea of Not Guilty.

Case placed on the ready calendar for trial.

By Order of The Court:

/s/ HAZEL G. McCRAW,  
Clerk. [34]

At Term: 2:40 p.m., Friday, April 28, 1947.

Present: Hon. Albert M. Cristy, Second Judge,  
Presiding.

B. W. Griep, Clerk.

O. Oswald, Reporter.

Counsel: Dudley Lewis, Esq.,  
Special Asst. Attorney General.  
Kenneth C. Young, Esq.,  
Special Asst. Public Prosecutor.  
Peter Lee, Esq., For Defendant.  
Defendant in Person.



Motion for Consolidation—Granted—Setting

Mr. Lee, attorney for defendant, having filed with the Court a Motion for Consolidation of cases in Cr. No. 19015 and Cr. No. 19018, and Prosecution having no objection to the same, the Court therefore ordered the consolidation of the two cases and that the same be tried together.

The Court set the said two cases for jury trial on Monday, May 12th, 1947, at 9:00 a.m.; jury panel to be drawn on Thursday, May 8th, 1947, at 8:30 a.m.

By Order of The Court:

/s/ B. GRIEP,

Clerk.

Note: For Minutes Covering Trial of the Above Entitled Case, Refer to Minutes in Criminal File No. 19015. [35]

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REPORTER'S TRANSCRIPT

PAUL AU

Transcript of shorthand reporters' notes of the following:

1. The testimony of the Territory's witness, Paul Au, beginning with the line on page 88 (Volume I) of said transcript, which reads:

“Q. Mr. Au, at the time that Captain Caminos came on the——”



(Testimony of Paul Au.)

and ending with the line on page 98 of said transcript, which reads: "through Bill Clark.":

Q. Mr. Au, at the time that Captain Caminos came on the—was on the Vice Squad you stated you first met him in June of 1945; what at that time was going on in the Honolulu Rooms?

A. Before that time we had gambling going on, then we waited to put on the gambling again; and then on or about the 9th day of June we put this gambling on again because I talked to Sergeant Bill Clark; he assured me——

Mr. Patterson (Interrupting): Now I object; I ask that that be stricken and the jury instructed to disregard it, that gambling went on again because he talked to Bill Clark.

The Court: That's perfectly admissible; he hasn't stated what Bill Clark told him. What Bill Clark conversed with you about is not evidence, Mr. Au, but the fact that you started after a conversation is still within the rule, Mr. Patterson.

Mr. Patterson: We take an exception.

The Court: Exception noted.

Mr. Patterson: I wish your Honor would again instruct this witness to talk loud; he can talk loud enough so that we can hear him over here; I don't say he's purposely doing it but he talks low most of the time and we can't quite hear it.

The Court: Mr. Au, see if you can't talk so that these lawyers can hear, at least so that all the jury can hear.

A. This conversation with Bill Clark, I men-

(Testimony of Paul Au.)

tioned the fact to him that Captain Caminos was friendly—— [36]

Mr. Patterson (Interrupting): Now I object to this; it's hearsay what he mentioned to Bill Clark.

The Court: That isn't hearsay; that's his own words he claims he said; what Bill Clark answered might be hearsay.

Mr. Patterson: Well, we object to any statement going in the record which was made by this man in the presence of Bill Clark when the defendant was not present, as hearsay and not binding upon this defendant, irrelevant, immaterial and incompetent, and self-serving.

The Court: Well, it might be self-serving, that part of it; it is not hearsay; the Court will sustain the objection on the ground of self-serving, as to any conversation with Bill Clark in the absence of Mr. Caminos.

Mr. Patterson: We request that the jury be instructed to disregard the statement.

Mr. Lewis: If the Court please, I'd like to be heard on that. This witness is not a defendant, as far as it being self-serving; I believe he can testify as to conversations.

The Court: Well, I don't know, Mr. Lewis; he's offered as an accomplice to an offense against the laws of the Territory. At the present time the Court will abide by the ruling; if you desire some recess to irrigate it further in the ears of the Court I'll listen to you.

Mr. Lewis: All right.

Q. Mr. Au, you did have a conversation with Bill Clark around the middle of June 1945?

A. Before the 9th day of June 1945.

Q. And as a result of that conversation did you do anything?

Mr. Patterson: Now I object to that upon the ground that it's not binding upon this defendant, it's self-serving, hearsay, irrelevant, immaterial and incompetent. If Bill Clark said something to him and then he said something, it's [37] not brought home to the defendant Caminos.

The Court: Objection overruled.

Mr. Patterson: Save an exception.

The Court: Exception allowed. Did you understand the question, Mr. Au?

A. After this conversation, next day or so I opened this gambling again in the Honolulu Rooms.

Mr. Lewis: Approximately what time was that?

A. I opened 'round about the 9th day of June, in the morning; I don't remember the hour.

Q. I was referring to the date, Mr. Au; about the 9th of June?

A. On or about the 9th day of June 1945.

Q. Did you have any other connection with Bill Clark after you opened up the gambling?

Mr. Patterson: May our same objection run to this questioning, if Your Honor pleases?

The Court: The Court will require you to make your objection to the question.

Mr. Patterson: Objected to upon the ground it's irrelevant, immaterial and incompetent, calling for hearsay testimony, it's self-serving, it's not binding upon this defendant in anyway whatsoever.

(Testimony of Paul Au.)

The Court: The general objection is rejected and you are allowed your exception.

A. On the 19th day of June——

Mr. Patterson (Interrupting): And may we further object upon the ground that this is a time not mentioned within the allegations of the indictment, also.

The Court: Objection overruled.

A. On the 19th day of June I gave Bill Clark \$900.00 for him and his boys, and one sealed envelope with \$500.00—— [38]

Mr. Patterson (Interrupting): I ask that that answer can be stricken as to the payment of money to Bill Clark for any purpose as not binding upon this defendant in anyway whatsoever, the transaction between him and Bill Clark; it has to be shown that this defendant is party to it.

The Court: I don't know, Mr. Patterson, how we can try it all with one question and answer; and the jury are instructed that this kind of evidence is merely background evidence and is not binding at this time upon alleged payments made upon Mr. Caminos, but you may have a right when the case is over to consider it in connection with the credibility and the procedure and the whole transaction that he testified to. The objection is overruled.

Mr. Patterson: Save an exception.

The Court: Exception noted.

Mr. Lewis: Could we have the question read back, please?



(Testimony of Paul Au.)

The Court: Have you got the question and answer, Mr. Reporter?

(Reporter reads last answer.)

A. The sealed envelope I instructed Bill Clark to give to Captain Caminos.

Mr. Patterson: I ask that that be stricken, upon the ground it's not binding upon this defendant, it's irrelevant, self-serving, and incompetent and immaterial. Certainly, Your Honor, they must show by evidence ahead of time before they allow this man to go on and relate a conversation which he had with another man or the act that this man committed; it's another act, when this individual here was not present, and it has not been brought home to him in any way; certainly it's not evidence against this man and it's prejudicial.

The Court: Objection overruled.

Mr. Patterson: Save an exception.

Mr. Lewis: Well, in connection with this sealed envelope you gave certain instructions to Bill Clark, is that correct? [39]      A. Yes.

Q. Now Mr. Au, turning to the month of August 1945, did you have any connection with Bill Clark during the month of August?

A. On the 18th day of August I gave——

Mr. Patterson (Interrupting): Now just a minute, if Your Honor pleases; I object to this question upon the ground that it's irrelevant, immaterial and incompetent, and not within the issues of this case, upon the ground that it is self-serving, upon

(Testimony of Paul Au.)

the ground that it is hearsay, and upon the further ground, if Your Honor pleases, it's evidence with reference to a transaction which happened a great length of time before the date set out in this indictment.

The Court: The precise date, Mr. Patterson, is the 18th of August, of the first count of the indictment No. 19015.

Mr. Patterson: Just a minute, Your Honor; I may be wrong about that.

The Court: 19015, first count.

Mr. Patterson: Now then, if Your Honor pleases, I also ask that the whole testimony with reference to the alleged handing of money to Bill Clark on the 19th day of June 1945 be stricken from the record, upon the ground that it is too remote and is not binding upon this defendant, and it's a crime for which he is not charged, it's not set forth in any way.

The Court: Objection overruled.

Mr. Patterson: Save an exception.

Mr. Lewis: I'd like to have the answer read back; I'm not sure if he finished it.

The Court: I don't think he answered; he's been objecting to a question. Will you read the question, Mr. Reporter.

(Reporter reads last question and the unfinished answer.)

Mr. Lewis: Will you continue your answer, Mr. Au?



(Testimony of Paul Au.)

A. On the 18th day of August I gave a sealed envelope with \$900.00 to Bill Clark; I instructed to Bill Clark for him to give the envelope with the money to Captain Caminos; and the [40] following week——

Q. (Interrupting): Did you give him anything else at that time?

A. I gave one envelope with \$900.00 for Bill Clark and his boys, besides this sealed envelope.

Q. How was this second envelope?

A. The second envelope was sealed and to show the distinction it was for Captain Caminos.

Q. There were two envelopes?

A. One sealed, and one not sealed.

Mr. Patterson: I'm going to object to this line of testimony upon the same grounds previously stated, that it's irrelevant, immaterial, incompetent, it's hearsay, self-serving and not binding upon this defendant in any way whatsoever.

The Court: I'd like to have you demonstrate to me, Mr. Patterson, anything "hearsay" about a person who is stating what he said, not what he heard said.

Mr. Patterson: Now, if Your Honor pleases, my understanding of the law of hearsay is that facts are hearsay in acts as well as words; that a man can do things, he can make a move, he can make a sign, or he can take an action, and it's in the same class as hearsay; it isn't alone words spoken, according to my theory of evidence or which constitutes hearsay; the acts, the way a thing is done, are also hearsay.

(Testimony of Paul Au.)

The Court: I'm sorry; the Court will have to disagree with your abstract on hearsay, Mr. Patterson.

Mr. Patterson: This isn't the first time the Court has disagreed with me, but I hope it will be the last time; save an exception.

Mr. Lewis: You've testified as to the 18th day of August, that was the first time? [41]

A. Yes.

Q. When did you next see Bill Cark, and what happened?

A. One week after, on the 25th of August, I gave him the same kind of envelopes and gave him the same instructions with the sealed envelope of \$900.00 to give to Captain Caminos—\$500.00 rather.

Mr. Patterson: May our objection, same objection, run to this line of testimony as to the other, Your Honor.

The Court: The Court at this time will permit you to have your objection and exceptions to this line of evidence in the words and phrases used, with the exception.

Mr. Lewis: What happened on the 25th day of August, Mr. Au?

A. On the 25th day of August I gave \$900.00 in an envelope, not sealed, for Bill Clark and his boys, and one sealed envelope with \$500.00 with instructions to give to Captain Caminos.

Q. And, following the 25th day of August, when did you next contact Bill Clark?

A. On September 2nd, eight days afterwards,

(Testimony of Paul Au.)

being Sunday, I gave Bill Clark \$900.00 in an envelope, not sealed, for him and his boys, and I also gave one envelope, sealed, with \$1,500.00, with instructions to give to Captain Caminos.

Q. Anything else?

A. And one envelope, not sealed, which had \$1,500.00, for Bill Clark himself.

Q. In other words, on September 2nd you gave to Bill Clark four envelopes?

A. Four envelopes; two not sealed and two sealed envelopes.

Q. When did you next see Bill Clark, and what occurred on that occasion?

A. On the 9th of September I gave Bill Clark one envelope with \$900.00 for him and his boys, and \$500.00 in a sealed [42] envelope with instructions to give to Captain Caminos.

Q. As to the envelope containing the \$900.00, will you describe that; was it sealed or unsealed?

A. That \$900.00 envelope was not sealed.

Q. When did you next see Bill Clark, and what occurred, if anything?

A. On the 16th day of September I gave Bill Clark \$900.00, in an envelope not sealed, for him and his boys, and \$900.00 in a sealed envelope with instructions to give to Captain Caminos.

Q. Now Mr. Au, at the time of these payments that you've just described what was going on in the Honolulu Rooms?

A. Gambling every day, practically every day.

Q. Were you conducting the gambling by yourself?

(Testimony of Paul Au.)

A. I had a few partners with me, and the gambling game was running on upstairs.

Q. Who were your partners, at that time?

A. In September, 'round this time, the 16th day of the month, I had B. T. Choy, and Harry Hosoi.

Q. How about on the 18th day of August and the remainder of the month of August, did you have any partners then?

A. On the 18th day of August I had B. T. Choy and Harry Hosoi.

Q. How about on the 25th day of August, 1945?

A. 'Round that time I also had Buck Lee Kimura, that's his last name, the name I know him by, and Spike Wong.

Q. How about on the 25th day of August, did you have any connection with Harry Hosoi and B. T. Choy at that time?

A. B. T. Choy and Harry Hosoi were also my partners.

Q. Now Mr. Au, following this last payment that you've [43] described in September, what happened during the months of—the remainder of the month of September and the months of October, November and December, 1945?

A. From then throughout the year gambling was going on.

Q. Did you continue to see Bill Clark?

A. I continued to see Bill Clark.

Q. What day of the week did you see him on?

A. In the months of September, October, November, and December, every Sunday.



(Testimony of Paul Au.)

Q. And will you describe what happened on these Sundays when you saw Bill Clark, in general?

Mr. Patterson: Objected to upon the ground it's irrelevant, immaterial, incompetent, not binding upon this defendant, self-serving, hearsay.

The Court: Objection overruled.

Mr. Patterson: Save an exception.

A. Every Sunday I saw Bill Clark I give him the "dong dong" in the envelope.

Q. What do you mean by "dong dong"?

A. Dong dong is a term in the gambling business as money in payoff to the police.

Q. Protection money, in other words?

A. Protection money.

Mr. Patterson: I ask that that answer be stricken and that counsel be instructed not to lead the witness, if Your Honor pleases.

The Court: Objection overruled.

Mr. Patterson: Save an exception.

Mr. Lewis: Now Mr. Au, coming to the first week in January, 1946, did you see Bill Clark at that time? [44]

A. On the 6th day of January, 1946, that Sunday I saw Bill Clark and I gave him \$2,100.00 in a sealed envelope, and in another sealed envelope of \$2,800.00 with instructions to give to Captain Caminos.

Mr. Patterson: What was the second amount?

A. \$2,800.00.

Mr. Lewis: Did you give him anything else at that time?

(Testimony of Paul Au.)

A. I gave \$2,100.00 for Bill Clark and his boys, and \$2,800.00 in another envelope, not sealed, for himself.

Q. How about the following week, did you see him then, the following week, in the middle of January, 1946?

A. On the 13th day of January, that Sunday I saw Bill Clark and I gave him \$2,100.00 for himself and his boys, and a sealed envelope with \$2,100.00 and I instructed him to give that sealed envelope to Captain Caminos.

Q. Now Mr. Au, after the 15th day of January—or the 13th day of January did you continue payments to Bill Clark in the manner you've described?

A. The 13th day of January was the last payment I gave to Bill Clark and the last money I sent to Captain Caminos through Bill Clark. [45]

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WILLIAM K. CLARK

2. The testimony of the Territory's witness, William K. Clark (a) beginning with the line on page 167 of said transcript which reads: "Q. When you first met Paul Au in January, 1945, who was the" and ending with the line on page 169 of said transcript which reads: "The Court: Exception allowed.":

Q. When you first met Paul Au in January, 1945 who was the Captain of the Vice Squad?

A. Captain Hitchcock.



(Testimony of William K. Clark.)

Q. Did you make any arrangements with Paul Au for the protection of his gambling place?

A. No, I did not make any arrangements with Paul Au at the time; I was sent down by Captain Hitchcock to see Paul Au.

Q. And what transpired when you did see him?

Mr. Patterson: That's objected to upon the ground it's irrelevant and immaterial and incompetent, if Your Honor pleases, what arrangements he made with Captain Hitchcock.

The Court: He didn't ask what arrangements he made with Paul Au.

Mr. Patterson: For Captain Hitchcock; that's not binding upon this defendant.

Mr. Lewis: If the Court please, this will all be tied up before his testimony is finished.

The Court: Objection overruled.

Mr. Patterson: Save an exception. We object to it upon the further ground that it calls for hearsay testimony, is a self-serving declaration, irrelevant, incompetent and immaterial.

The Court: Upon the latter point the Court will caution the witness that no statements of Paul Au are admissible through your lips, but all you may have instructed Paul Au you may testify to.

Mr. Patterson: I object to that, Your Honor——

The Court (Interrupting): And Mr. Patterson's objection to that and his exception are allowed. [46]

Mr. Patterson (Continuing): Upon the grounds previously stated, especially during the early part of 1945, six or eight months before this indictment.

(Testimony of William K. Clark.)

Mr. Lewis: Mr. Clark, when you first went to see Paul Au what was the nature of your conversation with him?

Mr. Patterson: That's objected to upon the ground it's irrelevant, immaterial, and incompetent, and not binding upon this defendant.

The Court: Objection overruled.

Mr. Patterson: Save an exception.

Mr. Lewis: Did you understand the question?

A. Ask me the question again.

Q. I say, when you went to see Paul Au in early 1945 what was the nature of your conversation with himh? A. An arrangement for a payoff.

Q. An arrangement for a payoff? A. Yes.

Mr. Patterson: I ask that that answer be stricken and the jury instructed to disregard it; nothing to show that Caminos was even in the picture at that time, if Your Honor pleases, from all the evidence so far he was down in the country working on some other job, there's no evidence that he knew any of these people.

The Court: The jury will be instructed if it isn't connected up, Mr. Patterson, but I can't anticipate; the objection is overruled.

Mr. Patterson: May we have an exception, if Your Honor pleases.

The Court: Exception allowed. [47]

\* \* \*

(b) beginning with the line on page 182 of said transcript which reads: "Mr. Lewis: You started to testify, Mr. Clark that when" and

(Testimony of William K. Clark.)

ending with the line on page 183 reading: "Mr. Lewis: No further questions.":

Mr. Lewis: You started to testify, Mr. Clark, that when Hitchcock was Captain of the Vice Squad that you made some arrangement with Paul Au, is that correct?      A. Yes.

Q. And that arrangement involved the payoff?

A. Yes.

Q. When Captain Caminos came on the Vice Squad to relieve Hitchcock in May of 1945,—

Mr. Patterson (Interrupting): This testimony with reference to what took place during Hitchcock's time I understand our objection runs to that all the way through; it's the same point, Your Honor, upon the ground it's irrelevant, immaterial and incompetent and not binding upon this defendant.

The Court: Not binding on this defendant until connected up; he's testifying of having relayed the conversation, according to him, to Mr. Caminos when he came in office. Objection overruled.

Mr. Patterson: Save an exception.

The Court: Exception allowed.

Mr. Lewis: I don't believe I had finished my question.

(Reporter reads last question.)

Mr. Lewis (Continuing with last question): Did you have any conversation with Caminos with respect to this prior arrangement under the Hitchcock regime?      A. I did.

(Testimony of William K. Clark.)

Q. And what was that conversation?

A. He asked me what was the Paul Au payoff for the protection of his game. I told him that in Hitchcock's time I was supposed to get a thousand dollars a week for the other men and the Captain was to get a thousand dollars a week, and that was paid to Hitchcock and I; but when I went to get my thousand dollars and Hitchcock's thousand—I didn't [48] look in Hitchcock's envelope at the time—I got \$900.00 in my envelope. I asked Paul Au——

Q. (Interrupting): Never mind that. In connection with your conversation with Caminos did you relate that to him?           A. I did.

Q. And what did Caminos say to that?

A. Caminos says it's agreeable with him.

Q. And after that, pursuant to that arrangement, what happened?

A. We got paid off that amount pretty near every week.

Q. By Paul Au?           A. Yes.

Q. And whom did you give the money that you received from Paul Au to?

A. I gave it to Captain Caminos, one envelope; the other envelope I kept and gave it to the men that worked under me, a hundred dollars apiece.

Mr. Lewis: No further questions.

\* \* \*

(c) Beginning with the line on page 173 of said transcript which reads: "Q. What did you do with your money, Mr. Clark?" and ending



(Testimony of William K. Clark.)

with the line on page 174 of said transcript which reads: "thousand in bonds.":

Q. What did you do with your money, Mr. Clark?      A. Put it in the vault.

Q. Where was that?      A. National Bank.

Q. Bishop National Bank?      A. Yes.

Q. How much did you accumulate?

A. \$138,000.00 in cash—\$128,000.00 in cash, and a few thousand in bonds. [49]

\* \* \*

(d) beginning with the line on page 187 of said transcript, which reads: "Q. That makes your 'take' for that year \$39,000.00 from" and ending with the line on page 189 of said transcript which reads: "A. That's right.":

Q. That makes your "take" for that year \$39,000.00 from Paul Au?      A. Yes.

Q. And all that money you put in the safe deposit box?      A. Yes.

Q. Did you spend any of that money?

A. About \$10,000.00.

Q. That give you about \$29,000.00 Paul Au money in the safe deposit box?      A. Yes.

Q. Were you getting money from anybody else?

A. Yes.

Q. Who else?      A. Fat Loo.

Q. What place did he run?      A. Fan-tan.

Q. No; what place did he run?

A. Service Hotel.

Q. And I suppose that's all?      A. No.

(Testimony of William K. Clark.)

Q. Anybody else?      A. Western Rooms.

Q. Western Rooms, who is that?

A. That's Small Snake.

Q. How much you got from Small Snake?

A. During 1945?

Q. Yes. [50]

A. Oh, I collected \$700.00 from him; I get \$250.00 and the Captain gets 250, and the other 200 goes to the boys 50 apiece.

Q. So you get \$250 a week, your "take"?

A. That's right.

Q. That give you about a thousand dollars a month?      A. That's right.

Q. So from Small Snake you got \$12,000.00 that year?      A. That's right.

Q. Did you get any bonus from him?

A. No.

Q. Did you spend any of that \$12,000.00?

A. No, I don't think so.

Q. So, you add the twelve thousand to your twenty-nine thousand, you get forty-one thousand that year, that's from Paul Au and Small Snake Lee, correct?      A. Yes.

Q. Who was the other man?      A. Fat Loo.

Q. Was it a big outfit like Paul Au?

A. Yes, big like Small Snake, \$700.00 a month.

Q. So you get the same thing from Fat Loo?

A. That's right.

Q. And that \$12,000.00 was in the safe deposit box?      A. Yes.



(Testimony of William K. Clark.)

Q. That gives you for that year 1945 \$53,000.00, is that right? A. I think so.

Q. Any other money you made that year?

A. Yes; D. C. Chang.

Q. Was he a big outfit?

A. No; he give me in a package of cigarettes, \$70.00 wrapped up in a package of cigarettes; that \$70.00 goes to each of my boys working under me, and I had only \$250.00. [51]

Q. That \$70.00 and that \$250.00, of that total sum how much you get?

A. I get 250 of that; each of the boys gets 70 wrapped in cigarettes.

Q. So from D. C. Chang you get also \$12,000.00 a year, \$250.00 a week? A. That's right.

\* \* \*

(e) beginning with the line on page 219 of said transcript which reads: "Q. Now in connection with your payments from these other" and ending with the line on page 221 of said transcript which reads: "envelope, it was just dished out to me that way":

Q. Now in connection with your payments from these other gambling establishments, you stated that you collected from D. C. Chang \$250.00 a week during the year 1945, for yourself?

A. Yes sir.

Q. Now, how much did you get from Small Snake?

A. I collected \$700.00 from Small Snake through Fat Loo.

(Testimony of William K. Clark.)

Q. And what did you do with that \$700.00?

A. Of that \$700.00 I gave each of the boys \$50.00, leaving \$500.00, and I told the Captain that I give him—I offered him \$300.00 and I'll take 200, and the Captain told me to split the difference, that he'll have 250 and I'll have 250.

Q. So the payment you received from Small Snake of \$700.00, out of that you kept \$250.00 and \$250.00 went to Captain Caminos?

A. That's right.

Q. Now, how about the payments—and what were those payments for?

A. Those payments were for the protection of that gambling game.

Q. How about Fat Loo, did he run a gambling game during 1945? A. Yes.

Q. And how much did he pay you? [52]

A. \$700.00.

Q. And what did you do with that money?

A. \$50.00 for each of the boys that were working under me, \$250.00 went to the Captain, and I got \$250.00.

Q. Do you know a character by the name of "Hot Dog"? A. I do.

Q. Was he operating a gambling joint during 1945?

A. He operated it the latter part of 1945; he wasn't one of the first fellows that started.

Q. And did he make any payments?

A. Yes; he paid \$500.00 a week.

Q. What became of that money?

(Testimony of William K. Clark.)

A. Each of the boys had \$50.00 apiece, that's \$200.00; with \$300.00 left, Captain Caminos got 150 and I got 150.

Q. Do you know a character by the name of "Big Snake"? A. I do.

Q. That's not the same fellow as "Small Snake," is it A. No.

Q. Did he operate during 1945?

Mr. Lee: I object at this time. I think nothing was mentioned about Big Snake yesterday; and, furthermore, on the ground that this line of questioning is incompetent, irrelevant and immaterial, not relevant to the issues of this case where Captain Caminos is accused of receiving bribes from Paul Au through Bill Clark; and on that basis I ask that all the testimony made with reference to "Small Snake," Fat Loo, and "Hot Dog" be stricken.

The Court: Sorry, Mr. Lee; you brought it out on cross-examination, and the prosecutor has a right to complete it; objection overruled.

Mr. Lee: May I add, for the purposes of the record, that the cross-examination of these characters Small Snake, Fat Loo, and Hot Dog were in relation to the amount of money that the witness on the stand had received and the amount that he put in the safe deposit box. [53]

The Court: Well, it goes to the characterizing of that issue; objection overruled.

Mr. Lee: May I have an exception, if Your Honor please.

(Testimony of William K. Clark.)

Mr. Lewis: May we have the question, Mr. Reporter?

(Reporter reads last question.)

The Court: "Big Snake."

A. I don't remember whether he operated in 1945; he was in partnership with "Small Snake"; they had some argument, and he moved out; and I don't know whether it was 1945 or 1946, and "Big Snake" didn't last long when the investigation came up, it was maybe a month or a month and a half, maybe longer, maybe less, I'm not sure; but I got paid from him.

Q. You got paid by Big Snake either in the latter part of 1945 or 1946? A. Yes.

Q. And how much did Big Snake pay you?

A. \$700.00.

Q. And what became of that money?

A. \$50.00 went for each of the boys; \$500.00 left, \$250.00 went to Captain Caminos and I had \$250.00.

Q. Now these payments from these other persons Small Snake, Fat Loo, Hot Dog and Big Snake, how were those payments made?

A. Those payments were made through Fat Loo; Fat Loo done the collecting from the other gambling joints on it, and then I got the money; and most of those guys paid about the same date.

Q. Were the payments made in currency?

A. Yes.

Q. How did you receive that money?

A. I received that money \$700.00 in cash; it



(Testimony of William K. Clark.)

wasn't in the envelope, it was just dished out to me that way. [54]

\* \* \*

### THOMAS C. RODENHURST

3. The testimony of the Territory's witness, Thomas C. Rodenhurst, beginning with the line on page 229 of said transcript, which reads: "Q. During the month of November, 1945, did you see the" and ending with the line on page 232 of said transcript, which reads: "Mr. Lewis: No further questions"?

Q. During the month of November, 1945, did you see the defendant Clarence Caminos?

A. I did.

Q. Did you see him at the Pearl City Police Station? A. I did.

Q. Did you have a conversation with him?

A. I did.

Mr. Patterson: Objected to upon the ground it's irrelevant, immaterial and incompetent, not within the issues of this case.

The Court: I have no idea whether it is or not, Mr. Patterson; objection overruled.

Mr. Patterson: Save an exception.

Mr. Lewis: Will you tell us what that conversation was, Mr. Rodenhurst, describing the circumstances?

A. Mr. Caminos came to my office one day to talk to me about gambling activities in my district; he said in part that he had——



(Testimony of Thomas C. Rodenhurst.)

Mr. Patterson (Interrupting): Now just a minute; I object to any testimony of this witness about any gambling activities in that district covering the year 1945; it's an entirely separate matter, has nothing to do with this particular issue at all, it's not binding on this defendant; we have no opportunity to meet it, it's conversation that took place about something in another district altogether, and it is not in corroboration and it is no part of the evidence in this case, and it tends to establish a separate and distinct transaction which is not in issue here in any way whatsoever.

The Court: Objection overruled. [55]

Mr. Patterson: Save an exception.

The Court: Exception allowed.

Mr. Lewis: Will you continue?

A. He talked to me about gambling activities in my district with reference to cockfights; he wanted me to assist him in permitting the games to be held——

Mr. Patterson (Interrupting): May our objection run to all this line of testimony, if Your Honor pleases?

The Court: Yes.

A. He wanted me to assist him in permitting the game to be run in the district of Ewa; he said that he'd like to establish these cockfights, particularly down at the Ewa Beach Lots section, and that he would attend to all the particulars and make all the arrangements. I asked him what part I would play in it, and he said, "Let them play,"

(Testimony of Thomas C. Rodenhurst.)

and, he said, "You'll get yours"; and I said, "What do you mean by that, how much are you going to give me, is that what you mean?" He said, "Yes." He would not stipulate as to any amount, he just said, "You'll get yours." I said, "What are your plans?" He said, "To permit the game to run" in my district one week, the following week to go some place else, in Wahiawa, Kailua, and then down to Kaneohe another week, and then go back to Honolulu, and then revolve it around the district in that respect. I told Mr. Caminos that I was not interested in any such plan, that I'll have no part of it, that I was not interested in any such money under any circumstances, and that I refused to be a part of his plan, that if he wanted to go ahead with his own idea that's his business but I'll have no part of it and any games that are run in my district that I know about or my men know about will be raided.

Q. Did he say anything further than that?

A. Well, he told me not to be a "damn fool," he said, "Only a fool dies poor"; then I said, "Then I'm a damn fool, because I don't want any part of you and I'll die poor." [56]

Q. Mr. Rodenhurst, you said he came to you to talk about gambling activities and in that conversation the matter of cockfighting came up; what kind of cockfights were these?

Mr. Patterson: That's objected to upon the same ground, may our exception run to all this line of testimony, please?

(Testimony of Thomas C. Rodenhurst.)

The Court: Yes.

A. Cockfights that are held by Filipinos; they use gaffs on the roosters and they bet on these games.

Q. They bet on the games? A. Yes.

Mr. Patterson: I object to that upon the ground it hasn't been shown; it's leading and suggestive, not a proper question.

The Court: Counsel is simply obviously trying to catch what the witness' word was; the witness had used that phrase, and he asked him——

Mr. Patterson (Interrupting): The witness did not use that phrase.

Mr. Lewis: We call for the record.

The Court: I'm sorry, Mr. Patterson; the Court heard.

Mr. Patterson: Can I have the witness' answer, Your Honor?

The Court: Yes.

Mr. Patterson: What was the witness' answer?  
(Reporter reads last answer.)

Mr. Patterson: I withdraw my remark, Your Honor; I don't withdraw my objection and exception to this line of testimony.

The Court: I understand; the whole conversation is under your objection and exception, Mr. Patterson.

Mr. Lewis: No further questions. [57]

## LAWRENCE FAT LOO

4. The testimony of the Territory's witness, Lawrence Fat Loo: Beginning with the line on page 249 of said transcript which reads: "Mr. Lewis: Mr. Loo, how did you make a livelihood?" and ending with the line on page 254 of said transcript which reads: "Mr. Lewis: No further cross-examination":

Mr. Lewis: Mr. Loo, how did you make a livelihood?      A. Gambling.

Q. You were a professional gambler?

A. Yes.

Q. Did you operate a gambling place in the year 1945?      A. I did.

Q. And where was that located?

Mr. Patterson: That's objected to upon the ground it's irrelevant, immaterial and incompetent, not binding upon this defendant; should be connected up.

Mr. Lewis: If the Court please, we'll connect it up in connection with the previous testimony.

The Court: Objection overruled.

Mr. Patterson: Save an exception.

A. What was the question again?

Mr. Lewis: Where did you operate this gambling establishment?

A. On Pauahi and Maunakea.

Mr. Patterson: Talk a little louder, please, so we can hear you.

A. On Pauahi and Maunakea.

Mr. Lewis: In the City and County of Honolulu?



(Testimony of Lawrence Fat Loo.)

A. Yes.

Q. And did you operate there in the months of August and September, 1945? A. Yes.

Q. Will you tell us how you were able to operate? A. Well, we were paying—— [58]

Mr. Patterson (Interrupting): Now I object to this testimony; you can see what is going to be—upon the ground it's irrelevant, immaterial and incompetent, not binding upon this defendant, it's hearsay, not within the issues of this case; anything that this man done is not binding upon Caminos.

The Court: You're a better mind-reader than the Court, Mr. Patterson; I'll have to overrule the objection from what the witness has said.

Mr. Patterson: It's right there; you don't have to be a mind-reader.

The Court: Your objection and exception may go to the entire line.

Mr. Lewis: May we have the question read?

(Reporter reads last question and incomplete answer.)

The Court: Speak up, Mr. Loo.

A. Yes. We were paying Sergeant Clark to——  
Juror (Interrupting): I can't hear at all.

Mr. Lewis: Members of the jury can't hear you, Mr. Loo; talk up loud.

A. Well, we were paying Sergeant Clark \$700.00 a week so that we will not be raided.

Q. And how long did those payments continue?

Mr. Patterson: I ask that that answer—I didn't know he had finished; I ask that that answer be



(Testimony of Lawrence Fat Loo.)

stricken upon the ground that it's irrelevant, immaterial and incompetent, it's not within the issues of this case, it's an entirely different transaction than anything that is alleged in this indictment; this man is charged with accepting bribes from Paul Au, and for this man to testify about a supposed payment to a third person with reference to a game and a different man altogether is an entirely different crime which we'll be prepared to meet if it's ever presented, if it isn't [59] presented at this time the defense is entitled to be informed and, Your Honor, we come in here in a great crime that's given in evidence here of the crime alleged, the crime between him and a man that he was bribing, and it's not binding upon Caminos; Your Honor, it's an entirely separate transaction; we have authorities about that if Your Honor wants to see them.

The Court: The Court is familiar with the general background; the evidence is permitted solely from the standpoint of the law allowing evidence of other like transactions to bear upon the credibility of witnesses in the specific transaction now charged, now too remote in time but of the same character; and your objection is overruled.

Mr. Patterson: We'd like to cite authorities on that, Your Honor.

The Court: I'm not wasting time now; you can do it with the appellate court; you've got your exception.

(Testimony of Lawrence Fat Loo.)

Mr. Patterson: I'm not asking about any appellate court, Your Honor; I'd like to be heard.

The Court: I have ruled; we're pau.

Mr. Patterson: I save an exception, if Your Honor pleases, to not being allowed to address the Court; I assign it as error, prejudicial to the rights of this defendant.

The Court: Your assignment is noted; the Court has ruled, and that is ended on this episode, Mr. Patterson; you'll kindly sit down.

Mr. Patterson: We save an exception, if Your Honor pleases.

Mr. Lewis: Mr. Loo, you stated that you paid to Sergeant Clark the sum of \$700.00 a week; how long did those payments continue?

A. They continued up to the week of the police investigation. [60]

Q. Do you recall the date of that?

A. I don't remember.

Q. Do you remember what year it was in?

A. 1946.

Q. Do you remember the month or what part of the year it was in?      A. The early part.

Q. Mr. Loo, did you make collections from any other gambling house other than your own?

A. I did.

Q. What gambling houses were those?

A. One on Beretania Street.

Q. Who was the operator of that one?

A. Hong Lee.

(Testimony of Lawrence Fat Loo.)

Q. Is he also known as "Small Snake"?

A. Yes.

Q. How much did you collect from him?

A. 700.

Mr. Patterson: Objected to upon the ground it's irrelevant, immaterial and incompetent, not within the issues of this case, the collection of money by this man from a man by the name of "Small Snake" who was never in this case, who has never been mentioned in it, and to have this man testify about money which he paid to him, to "Small Snake" for a certain bribe is not binding upon the defendant Caminos.

The Court: The objection is of the same character; the Court has understood, Mr. Patterson, that your objection similarly stated goes to the entire line; I don't know that there's any necessity for specifically renewing it; that Court's faith and confidence in giving it to you that way has not been withdrawn; I understand it goes to the entire line of this witness, and so stated to you when you made your first objection. [61]

Mr. Patterson: I think this question is a little different; we save an exception.

The Court: Exception allowed; and I again state that your objection and exception goes to the entire line of the evidence from this witness having to do with other offenses.

Mr. Patterson: On every possible ground that can be put forth.

(Testimony of Lawrence Fat Loo.)

The Court: Yes, that you've put forth, and if any new ones you're at liberty to state them.

Mr. Lewis: Mr. Loo, you say you collected from "Small Snake"? A. Yes.

Q. How much did you collect from him?

A. \$700.00 a week.

Q. During what year? A. '45.

Q. 1945? A. Yes.

Q. What did you do with that money that you collected from "Small Snake"?

A. I gave that to Bill Clark.

Mr. Patterson: Speak up, Mr. Loo.

Mr. Lewis: You turned that over to Bill Clark?

A. Yes.

Mr. Lewis: No further questions. [62]

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## RICHARD KAZUO MIKAMI

5. The testimony of the Territory's witness, Richard Kazuo Mikami, beginning with line on page 774 of said transcript which reads: "Q. Mr. Mikami, in the latter part of 1945, in late November," and ending with the line on page 809 of said transcript which reads: "The Court: Motion is denied":

Q. Mr. Mikami, in the latter part of 1945, in late November, did you pay to Clarence Caminos the sum of \$200.00?

Mr. Patterson: One minute. That's objected to upon the ground it's a question about a collateral matter; we're certainly not going to try this case



(Testimony of Richard Kazuo Mikami.)

now, if Your Honor pleases; it's a collateral issue, irrelevant, immaterial and incompetent, and not part of the prosecution's case in chief; if we go into this then we'll have to try this thoroughly.

The Court: Objection overruled.

Mr. Patterson: Save an exception.

A. What was the question?

The Court: Read the question back to him.

(Reporter reads last question.)

A. Yes, sir; for the use of the beach house at Mokuleia.

Mr. Lewis: Kazuo, did you ever pay Clarence Caminos any money for any other purpose?

A. No, sir.

Mr. Patterson: That's objected to upon the ground that the proper foundation has not been laid; it's irrelevant, immaterial and incompetent, not part of the case in chief, and it's trying to bring in a collateral issue which is not proper in this case and which is not relevant; it is immaterial, irrelevant and incompetent even in the case in chief in a case of this kind.

The Court: The objection will be sustained on the framing of the question; "ever" includes a long time.

Reporter: It was answered, Your Honor.

Mr. Patterson: What was that answer?

Reporter: "No, sir." [63]

The Court: Do you want the answer stricken, Mr. Patterson?



(Testimony of Richard Kazuo Mikami.)

Mr. Patterson: Yes, I want it stricken; I don't think it has any business in here.

The Court: The answer may be stricken.

Mr. Lewis: Mr. Mikami, at the time you gave him the money didn't you tell him that you were operating a crap game in the back of the Country Motors?

Mr. Patterson: That's objected to upon the ground it's irrelevant, immaterial and incompetent, seeking to bring in a collateral issue which we're not prepared to try at this time, if Your Honor pleases, and which is not proper examination although the witness has already said "no" to this question. I still ask that that answer be stricken, upon the ground that it's not competent in this case; we're not prepared to try any other cases.

The Court: The precise objection made the Court overrules.

Mr. Patterson: We save an exception, if Your Honor pleases.

Mr. Lewis: What was the answer?

A. What's the question?

(Reporter reads last question.)

Mr. Patterson: We object to it upon the ground that the proper foundation had not been laid too, Your Honor.

The Court: Objection overruled.

A. I don't remember.

Mr. Lewis: You don't remember?

A. Yes, sir.

Q. Do you deny it?

A. No, sir. [64]

(Testimony of Richard Kazuo Mikami.)

Mr. Patterson: Just a minute. I ask that the answer be stricken for the purpose of an objection.

The Court: Well, let's hear the objection that you want to make.

Mr. Patterson: I object to the question upon the ground that it is irrelevant, immaterial and incompetent, upon the ground that it is not cross-examination, upon the ground that the proper foundation has not been laid; upon the ground that the matter seeks to bring out a collateral matter and that the prosecution is bound by the answers heretofore given, and it seeks to bring evidence in here to contradict a collateral matter and trying another issue upon which this defendant is not charged or indicted.

The Court: The objection will be considered as though made before the answer was given; and it is overruled.

Mr. Patterson: Save an exception, if Your Honor pleases.

The Court: Exception allowed.

Mr. Patterson: What was that last answer?

Reporter: The last answer was, "No, sir."

Mr. Lewis: Mr. Mikami, do you recall making a statement in the office of the Public Prosecutor on or about the third day of April, 1946, at about 2:55 o'clock in the afternoon?

A. Yes, sir.

Q. And at that time do you recall——

Mr. Patterson (Interrupting): Now we object to this impeachment of their own witness, as to

(Testimony of Richard Kazuo Mikami.)

statements formerly made, upon the ground that it's irrelevant, immaterial and incompetent, nor a proper part of their case in chief, that it's not proper examination at this time, it comes too late, it was part of their case in chief if they wanted to put it in; and upon the ground that it seeks to bring in a collateral issue which is not proper at this proceeding of this case especially, not pertinent evidence at this time.

The Court: The objection is overruled. [65]

Mr. Patterson: Save an exception.

Mr. Lewis: May we have the question?

(Reporter reads last question, unfinished.)

Q. Do you recall making a statement in the Public Prosecutor's office on the occasion I have just described?      A. Yes, sir.

Q. Do you recall the following question and answer being put to you——

Mr. Patterson (Interrupting): We object to any questions and answers about——

The Court: Mr. Patterson, reserve your objection until the question has been put and not interfere with counsel's opportunity to put a question.

Mr. Patterson: I most respectfully, Your Honor, submit that the proper time to make an objection is where you can see what's coming, before it is asked; and I except to being disallowed that privilege.

The Court: Proceed, Mr. Lewis.

Mr. Lewis: Do you recall the following question

(Testimony of Richard Kazuo Mikami.)

and answer: "In what manner was this money"—referring to the \$200.00—"in what manner was this money you gave him?" Answer: "I told him I'm having a crap game and I just gave him that \$200.00." Do you recall that?

Mr. Patterson: The question is objected to upon the ground it is irrelevant, immaterial and incompetent; it is irrelevant; upon the ground that they're seeking to impeach their own witness; upon the ground that the matter is collateral, and seeking to bring into the issues something that cannot properly be brought in at this time; it was never evidence in this case; and upon the further ground that they are bound—there is not—the answer—the question asked is not seeking or impeaching any testimony or contradicting any testimony which has been developed [66] during the issues in this case; it's entirely foreign to anything that has ever come into this case before; and upon the ground that it is a collateral issue and is not binding upon this defendant at this time.

The Court: Are you through?

Mr. Patterson: Yes.

The Court: Objection overruled.

Mr. Patterson: Save an exception, if Your Honor pleases.

The Court: Exception allowed. Was this answered, Mr. Reporter?

Reporter: No answer that I could hear.

Mr. Lewis: I'd like to have the question again, Your Honor.



(Testimony of Richard Kazuo Mikami.)

The Court: Read the question.

(Reporter reads last question.)

A. I don't recall that.

Mr. Lewis: Do you deny that you made such a statement?      A. I don't deny that.

Mr. Patterson: Just a minute; same objection to this question, if Your Honor pleases.

The Court: Same ruling.

Mr. Patterson: Save an exception.

The Court: Read the question, Mr. Reporter.

(Reporter reads last question and answer.)

Mr. Lewis: Kazuo, do you have any present recollection now of this incident when this \$200.00 was given to Captain Caminos?

Mr. Patterson: Objected to upon the same grounds, if Your Honor pleases.

The Court: Same ruling.

A. I didn't get the question.

The Court: Read the question. [67]

(Reporter reads last question.)

A. Yes—but not on that question.

Mr. Lewis: What?

A. I didn't understand that.

The Court: Referring to time that you say the incident actually happened of the \$200.00; do you remember now the circumstances around that time?

A. For what purpose I gave that money?

The Court: Anything that happened at that time; do you now remember?

A. Yes, sir.



(Testimony of Richard Kazuo Mikami.)

Mr. Lewis: Will you tell the entire transaction——

Mr. Patterson (Interrupting): Objected to—oh, pardon me, did you finish?

Mr. Lewis: Will you describe this giving of the money to Captain Caminos and what if anything you said to him at that time?

Mr. Patterson: Same objection, if Your Honor pleases, to that question.

The Court: Same ruling.

Mr. Patterson: Upon the further ground it's leading and suggestive and argumentative.

The Court: The only leading part and the only argumentative part is contained in your objection, Mr. Patterson.

Mr. Patterson: We save an exception to the ruling of the Court.

The Court: Mr. Reporter, will you now re-read the question again. Listen, Kazuo, to the question, please.

A. Yes, sir.

(Reporter reads last question.)

A. Well, I can't give you the exact words what I said, but [68] I told Mr. Caminos that he'll keep the money.

Q. What was the answer?

A. I told Mr. Caminos to keep the money because I used the beach home; he refused it that time, but I insist he take the money, you see; we went down there a couple of times with a lot of couples and used his beach home and his groceries

(Testimony of Richard Kazuo Mikami.)

and even the beer in the icebox; I don't know what the boys did, but when I came back I felt kind of guilty not paying him anything.

Q. At first he refused to take the \$200.00?

A. Yes, sir.

Q. Then what happened?

Mr. Patterson: May my objection and exception run to all this line of testimony?

The Court: Your original objections and all repetitions thereof will be considered as applying to the whole incident, Mr. Patterson.

Mr. Patterson: All right, Your Honor.

A. But I insisted him for taking the money because I feel better if he do take it, because in the future maybe I can borrow it again.

Mr. Lewis: And he did take it?

A. Yes, sir.

Q. Did he ever return that money to you?

A. No, sir.

Q. What? A. No, sir.

Q. Kazuo, did you give him this money in connection with this gambling game?

A. No, sir.

Mr. Patterson: Same objection, on the ground it presumes something not in evidence. [69]

The Court: Will you allow the attorney to finish his question, Mr. Patterson?

Mr. Patterson: If Your Honor pleases, yesterday I was accused of not being quick enough, and the man started, the answer come before I make my objection.

(Testimony of Richard Kazuo Mikami.)

The Court: The Court has ears, eyes, and is aware of the present incident; we're not referring to yesterday. Now, Mr. Patterson, will you desist until counsel finishes his questions? You can observe both counsel and the witness.

Mr. Patterson: Yes, but this question that was asked, this man was starting to answer it.

The Court: Yes, and you were wandering back and forth by the jury box. The Court will now ask you to be seated until we're ready, then object.

Mr. Patterson: I come over here because I have difficulty in hearing.

The Court: I have no objection to your moving your chair over near the jury box, but to walk back and forth while counsel is examining the witness is disruptive of orderly procedure; and the Court is simply asking you in courtesy to do so. Now, have you got a question, Mr. Lewis?

Mr. Lewis: Can we have the question read, if Your Honor please?

Mr. Patterson: And the answer.

(Reporter reads last question and answer.)

Mr. Patterson: There was an answer, wasn't there?

Reporter: Yes.

Mr. Patterson: Now Your Honor, may I ask that that answer be stricken for the purpose of interposing an objection?

The Court: You may interpose an objection; have you any new objection?

Mr. Patterson: I'm asking at this time that the

(Testimony of Richard Kazuo Mikami.)

answer [70] of this witness be stricken so that I can interpose an objection.

The Court: I said you may, Mr. Patterson.

Mr. Patterson: I take it from that that the answer is stricken, Your Honor.

The Court: That's what I told you twice; now do you want it a fourth time?

Mr. Patterson: Have you my objection there, Mr. Reporter? Will you repeat it.

Mr. Lewis: There's no objection to having the answer stricken.

The Court: The motion to strike has been granted.

Mr. Patterson: Now, I object to the question—will you read the question so I can get it?

(Reporter reads last question as well as the answer.)

The Court: That answer is stricken.

Mr. Patterson: Now, I object to that upon all the grounds previously stated, upon the ground that it presumes something not in evidence.

The Court: The Court will construe your last form of objection as referring to its being leading and suggestive, Mr. Patterson; I'll sustain it on that construction of your objection.

Mr. Lewis: Kazuo, before coming to trial—before coming here to testify today, has anybody spoken to you about this case?      A. No, sir.

Q. If you were to be shown the statement that you made at the Public Prosecutor's office on the



(Testimony of Richard Kazuo Mikami.)

date in question, that is, April 3, 1946, would that help you refresh your recollection?

Mr. Patterson: Objected to upon the grounds previously [71] stated, upon the ground it's leading and suggestive, improper, not within the issues, collateral issue, attempt to impeach their own witness.

The Court: Objection overruled.

Mr. Patterson: Not proper rebuttal, if Your Honor pleases; it rebuts nothing.

The Court: Objection overruled.

Mr. Patterson: Save an exception.

The Court: Read the question to the witness, Mr. Reporter.

Mr. Lewis: I'll reframe the question; strike that question and reframe it.

Q. Kazuo, would you like to refresh your memory or, wouldn't your memory be refreshed as to the incidents that happened with Caminos in late November, 1945, if you were to be shown your statement made in the Public Prosecutor's office?

Mr. Patterson: Same objection, if Your Honor pleases.

The Court: Same ruling.

A. I didn't understand that.

Mr. Lewis: Would you like to read your statement? A. No, sir.

Q. Will you read your statement?

Mr. Patterson: Objected to upon the ground it's irrelevant, immaterial, incompetent; its argumentative, leading and suggestive; upon all grounds previously stated.



(Testimony of Richard Kazuo Mikami.)

The Court: The objection to this question will be sustained; the witness said he didn't want to read it; he can't be compelled to read it.

Mr. Lewis: Kazuo, at the time that you made a statement in the Public Prosecutor's office on the occasion we've described, back in April, 1946, do you recall the following [72] question and answer: "What did you tell him before you gave him the money?" And the answer: "I'm having a crap game sometimes."

Mr. Patterson: That's objected to upon the ground it's already asked and answered; and upon all of the grounds previously stated to the questions that have been asked this witness, Your Honor.

The Court: Objection overruled.

Mr. Patterson: Save an exception.

The Court: Read the question, Mr. Reporter, to the witness.

(Reporter reads last question and answer.)

A. I don't remember that.

Mr. Lewis: Do you deny that you made such a statement? A. No, sir.

Mr. Patterson: Same objection to this last question, if Your Honor pleases.

The Court: The Court has granted you the same objection all the way through, Mr. Patterson, and the same exception.

Mr. Lewis: Kazuo, do you recall making on the same occasion in the Public Prosecutor's office, do you recall the following question and answer: (Q.)

(Testimony of Richard Kazuo Mikami.)

“How come you give him this \$200.00?” And your answer: “Well, I figured he was on the Vice Squad, so if I gave him he might overlook my place”; do you remember that?

Mr. Patterson: Now, we object to that on all of the grounds previously stated, and upon the further ground it's leading, suggestive and argumentative.

The Court: Objection overruled.

Mr. Patterson: Save an exception.

A. I don't remember. [73]

Mr. Lewis: Do you deny that you made such a statement there? A. No, sir.

Q. You might have made such a statement?

A. I might have made such a statement but I don't remember.

Q. And if you made such a statement it would be true?

Mr. Patterson: Object to that upon the ground it's argumentative; upon all the grounds previously stated; it's leading, argumentative, calls for the conclusion and opinion of the witness, seeks to impeach their own witness, it's not proper rebuttal.

The Court: Objection overruled.

Mr. Patterson: Save an exception.

Mr. Lewis: Let's have the question again, Mr. Reporter.

(Reporter reads last question.)

A. Do I have to answer that question, Your Honor?

The Court: Yes.

(Testimony of Richard Kazuo Mikami.)

Mr. Lewis: Are you afraid of incriminating yourself, is that it?

Mr. Patterson: Same objection, if Your Honor pleases.

The Court: Objection overruled.

A. The question, please?

(Reporter reads last question.)

A. No, sir.

Mr. Lewis: Well, will you answer the question?

A. What was the question?

(Reporter reads last question.)

A. That I cannot say.

Mr. Patterson: Same objection, if Your Honor pleases.

Reporter: I got an answer, if Your Honor please.

The Court: What's the answer?

Mr. Lewis: Do you mean you don't know whether it's [74] true or not?

A. Because I don't know whether I said that or not.

Q. The question is this, Kazuo: If you made such a statement, the statement being: "Well, I figured he was on the Vice Squad, so if I gave him he might overlook my place"—

Mr. Patterson (Interrupting): That's objected to upon the same grounds, and it's already been asked and answered, and it's argumentative.

Mr. Lewis: I'd like to finish my question.

The Court: Mr. Patterson, will you sit down, as the Court requested you to sit down?

(Testimony of Richard Kazuo Mikami.)

Mr. Patterson: I can hear over there.

The Court: All right; the Court has offered you a chair right up by the railing, so that you can see the mouth of the Public Prosecutor when he finishes his question, and if you had been attentive you'd have seen it; the question wasn't even completed. Now, Mr. Prosecutor, you're given an opportunity to reframe your question.

Mr. Patterson: Will the witness be instructed not to answer the question until I have a chance to object, please?

The Court: Kazuo, when Mr. Lewis has finished his question you wait a minute and give Mr. Patterson ample time to rise; he's seated now, you see, and he's right in front of you.

A. Yes.

The Court: Listen to the question; wait a second; if Mr. Patterson wants to rise you let him talk, then if you don't know the question and I allow it you can ask that it be read.

Mr. Lewis: Kazuo, if you made the statement in the office of the Public Prosecutor at the time just described—you remember that time? [75]

A. Yes, sir.

Q. If you made this statement: "Well, I figured he was on the Vice Squad, so if I give him he might overlook my place"; now, if you made that statement, then it was true? A. No, sir.

Mr. Lewis: May it be stricken, if Your Honor please?

The Court: The answer may be stricken.



(Testimony of Richard Kazuo Mikami.)

Mr. Patterson: Objected to upon all the grounds formerly stated; upon the ground it's not rebuttal; upon the ground it's additional impeaching evidence; and upon the ground it's argumentative.

The Court: The objection is overruled. Now, Mr. Reporter, will you read the question; and Mr. Kazuo, when the Reporter reads the question you may answer it without waiting any longer for Mr. Patterson; he's made his objection and I have overruled it. Read the question, Mr. Reporter.

Reporter: There was an answer, Your Honor.

(Reads question and answer.)

The Court: Let the answer stand, and the objection as made before the answer was given.

Mr. Lewis: Kazuo, do you mean by your statement now that the answer you gave at the Public Prosecutor's office was a false statement?

Mr. Patterson: Objected to upon the ground it's argumentative, and on all the grounds previously given.

The Court: Objection overruled.

Mr. Patterson: Save an exception.

The Court: Read the question now, Mr. Reporter, to the witness.

A. No, sir.

The Court: Did you get the question?

A. Let me get the question again. [76]

(Reporter reads last question.)

A. No, sir.

Mr. Lewis: Well, then, which statement is correct?



(Testimony of Richard Kazuo Mikami.)

Mr. Patterson: Same objection, if Your Honor pleases.

The Court: Same ruling.

A. The last statement.

Q. And what is that?

The Court: Speak up loud, Kazuo, so the jury can hear you.

A. That I didn't say to him when I——

Juror (Interrupting): Your Honor, we can't hear him.

The Court: Kazuo, tell the jury so that they can hear you; you've got a voice, look in that direction, talk to them.

A. What was the question; question and answer for the last couple, so that I can recall?

The Court: Read the last couple of questions, the witness asks.

A. That wasn't my answer; I just asked when.

Mr. Lewis: Well, tell the jury what the answer is.

A. I want the Reporter to give the last couple of questions.

The Court: Now, Mr. Reporter, what did you get of the witness' statement?

Reporter (Reading): "That I didn't say that to him when I——"

The Court: Is that all you got of the last statement?

Reporter: Yes, sir.

The Court: Kazuo, speak up what your answer is, will you please, so that the jury and the Re-

(Testimony of Richard Kazuo Mikami.)

porter and the parties and the Court can hear you.

A. Yes, sir.

Mr. Lewis: Kazuo, you've given—you've stated two [77] different versions of the reason for giving this \$200.00; one, you said it was for the use of his house, the use of Caminos' house; the other which you stated in the Public Prosecutor's office was that you figured he was on the Vice Squad and he might overlook your place; now, which one of those statements is correct?

Mr. Patterson: Objected to upon the same ground previously stated, upon the ground it's already been asked and answered.

The Court: Objection overruled.

Mr. Patterson: Save an exception.

The Court: Now, Mr. Reporter, will you read this question to the witness? Kazuo, listen to the question, please, and talk to the jury your answer so that they can hear you.

(Reporter reads last question.)

A. For the use of the house.

Mr. Patterson: Did the jury hear that?

Mr. Lewis: Then, Kazuo, you deny that your statement in the Public Prosecutor's office is correct?

Mr. Patterson: Same objection, if Your Honor pleases; upon the further ground that it's argumentative.

The Court: Objection sustained. I think it's covered, Mr. Lewis.

(Testimony of Richard Kazuo Mikami.)

Mr. Lewis: I beg your pardon?

The Court: I think the situation is covered, as to the inconsistency and what his present intent is.

Mr. Lewis: Kazuo, have you talked to him out in front of the courthouse about two afternoons ago when the bus was out there?

Mr. Patterson: Objected to upon all the grounds previously stated; upon the ground it's irrelevant, immaterial [78] and incompetent.

The Court: Objection overruled.

Mr. Patterson: Save an exception.

A. What was the question, sir?

Mr. Lewis: Read the question, Mr. Reporter.

(Reporter reads last question.)

A. Yes, sir.

Q. The answer is, "Yes, sir"?

A. Yes, sir.

Q. You did talk to Caminos then?

A. Yes, sir.

Q. What was the nature of that conversation?

Mr. Patterson: Same objection, if Your Honor please, upon the ground it's hearsay, irrelevant, immaterial and incompetent.

The Court: Objection overruled.

Mr. Patterson: Save an exception.

The Court: Read the question, Mr. Reporter.

(Reporter reads last question.)

A. I said, "How are you, how are you feeling?"

Mr. Lewis: What else?

Mr. Patterson: Objected to upon the grounds

(Testimony of Richard Kazuo Mikami.)

previously stated; upon the ground it presumes that something else was said.

The Court: The form of the question is objectionable.

Mr. Lewis: Did you discuss with Mr. Caminos the matter of the use of his place, his house, on this previous occasion?           A. No, sir.

Q. Did you discuss with Mr. Caminos the matter of your giving him this \$200.00?

A. No, sir.

Q. You never mentioned that at all? [79]

A. No, sir.

Q. Kazuo, do you know a police officer named Tom Rodenhurst?           A. Yes, sir.

Q. Did you also give him \$200.00?

Mr. Patterson: That's objected to upon the ground it's irrelevant, immaterial and incompetent, not rebuttal testimony, if Your Honor please; and upon all the grounds previously stated.

Mr. Lewis: If the Court please, I think we have—that was a matter brought out on cross-examination of our witness Rodenhurst.

The Court: Yes, but, Mr. Lewis, the rule that Mr. Patterson has attempted to invoke as to collateral matters does apply to collateral witnesses. The Court in refusing to sustain the objection in connection with transactions with Mr. Caminos is that he is the defendant, when collateral matters of similar character are open to evidence; but the questions brought out or attempted to be brought out from Mr. Rodenhurst on cross-examination by

(Testimony of Richard Kazuo Mikami.)

the defendant, the record is bound by that and further corroboration or going into it is not permitted. The Court sustains the objection.

Mr. Lewis: If the Court please, I'd like to be heard on that.

The Court: The Court sustains the objection.

Mr. Lewis: Kazuo, when were you operating a gambling game at your establishment, if at all?

Mr. Patterson: Objected to upon the ground it's irrelevant, immaterial and incompetent; it's leading, suggestive, presumptive; upon all the grounds previously stated, and that it's not part of the rebuttal in this case.

The Court: The last part of your objection is sustained. [80]

Mr. Lewis: Kazuo, in November of 1945 were you operating a gambling game in the back of your establishment?

Mr. Patterson: Same objection, if Your Honor pleases.

The Court: Same ruling; the objection is sustained.

Mr. Lewis: Kazuo, at the time that you gave Mr. Caminos this \$200.00 what did he do with the money?

Mr. Patterson: Objected to upon the ground it's irrelevant, upon all the grounds previously stated, upon the ground it presumes that he knows what he did with some alleged or imaginary two hundred dollars.

The Court: Objection overruled.



(Testimony of Richard Kazuo Mikami.)

Mr. Patterson: Save an exception, if Your Honor pleases.

The Court: Read the question to the witness.

(Reporter reads last question.)

A. I don't know what he did with the money.

Mr. Lewis: In what form was this \$200.00—in cash, or in check?

Mr. Patterson: Objected to upon the ground it's irrelevant, immaterial and incompetent, not rebuttal testimony, if Your Honor pleases, and all the grounds previously stated.

The Court: Mr. Patterson, the Court would like an understanding with you. You've asked for the objection of the character you just stated to go to the whole line of the incident of this witness with Mr. Caminos, and I granted that; and in spite of my granting it you arise and interrupt the proceedings with repetition. Now, which do you want; do you want the objection to go to the whole testimony, to this line, that you've made, and all ramifications of it; or do you want me to withdraw that ruling and let you make a separate and single repetition of the same objection to every question? I'd like to have an understanding between you and myself as the Court; which is it? [81]

Mr. Patterson: Very easy, Your Honor. The running objection to this was—he was going through a new picture; the reason I made the running objection was that—because I thought it wasn't noted. As long as this objection runs to every

(Testimony of Richard Kazuo Mikami.)

question that this man may possibly be asked on the witness stand, then I'm satisfied, Your Honor.

The Court: That's the purpose of my general objection offered to you and your exception. Now, do you want that, or don't you?

Mr. Patterson: I want it.

The Court: All right; then please subside with repetitions of it.

Mr. Patterson: I am especially cautious because the Supreme Court told me I didn't make enough objections.

The Court: Mr. Reporter, will you now read the question to the witness.

(Reporter reads last question.)

A. In cash.

Mr. Lewis: And where did you give it to him?

A. In front of my service station.

Q. That's at the Country Motors?

A. Yes, sir.

Q. And when you gave it to him did you see what he did with it?

A. He took it, that's all; I don't know what he did after that.

Mr. Patterson: Could I have that answer; I can't hear from here.

(Reporter reads last answer.)

Mr. Lewis: Did you observe what he did in your presence with that money?

A. I said he took the money. [82]

(Testimony of Richard Kazuo Mikami.)

Q. Where did he put it?

A. Must be in his pockets.

Mr. Lewis: If Your Honor please, could we have a short recess at this time?

The Court: We'll take a recess at this time.

(Recess—10:22 to 10:32 a.m.)

Mr. Lewis: Kazuo, how many times did you use Caminos' beach house?

Mr. Patterson: Our objections run to this line of testimony?

The Court: Yes.

Mr. Lewis: That is, prior to the time you gave him this \$200.00?

A. A couple of times, a couple of week-ends.

Q. A couple of week-ends? A. Yes, sir.

Q. And what year was that?

A. I can't exactly recall—either 1943 or 1944, somewhere 'round there.

Q. 1943 or 1944. A. Yes, sir.

Q. And you didn't give him the money until 1945? A. Yes, sir.

Q. And how many people used the beach place with you?

A. Oh, about four or five couples went down there.

Q. Where is this beach place located?

A. Mokuleia.

Q. Mokuleia? A. Yes, sir.

Q. Kazuo, at the time you made this statement in the Public Prosecutor's office—that's April 3rd, 1946—you went up there with Police Commissioner Richard Kellett? [83] A. I think so.

(Testimony of Richard Kazuo Mikami.)

Q. You know it, don't you?

A. If I seen him I know him.

Q. And at the time you made that statement  
Mr. Jardine—do you know Mr. Jardine?

A. Yes, sir.

Q. He was present?                      A. Yes, sir.

Q. Mr. Cederloff?                      A. He was there.

Q. He was there?                      A. Yes, sir.

Q. Were there other members of the Police  
Commission there, too?                      A. I don't think so.

Q. And at that time you didn't tell them any-  
thing about this use of the Caminos beach place,  
did you?                      A. I don't remember.

Juror: Talk a little louder.

A. I don't remember.

Mr. Lewis: I'd like to show you a statement  
that you made in the Public Prosecutor's office at  
that time; will you examine that?

Mr. Patterson: May I see it, please?

Mr. Young: To save time we'll let you have a  
copy.

Mr. Patterson: I'd rather look at the original.

The Court: Well, to save time while you're  
looking at it the witness may look at it—the copy  
that counsel has.

(Mr. Lewis hands document to the witness.)

Mr. Lewis: Have you read the entire statement?

A. Yes, sir.

Q. Did you understand it? [84]

A. Beg your pardon?

(Testimony of Richard Kazuo Mikami.)

Q. You understood what was written here?

A. Yes, sir.

Q. Do you recall—after reading this statement do you recall those questions and answers being asked you?

A. Some of them, sir.

Q. Did you make the answers that are recorded here?

Mr. Patterson: The same objection; and the further objection, if Your Honor pleases, upon the ground that this is leading and suggestive and incompetent at this time for any purpose whatsoever with reference to his statement.

The Court: The statute requires the laying of such a foundation, if counsel desires to impeach the former inconsistencies—or the statements of the witness on the stand on alleged former inconsistent statements.

Mr. Patterson: Save an exception.

The Court: The objection is therefore overruled.

Mr. Lewis: May we have the question and answer, Mr. Reporter?

Reporter: There was no answer to the last question.

The Court: Read the question so the witness may answer it.

(Reporter reads last question.)

Mr. Lewis: “Yes” or “No.”

A. You mean every one of them, sir?

Q. Yes.           A. That I don’t remember.

Q. Will you examine this statement again and tell us which ones you don’t remember making?



(Testimony of Richard Kazuo Mikami.)

Mr. Patterson: Same objection, if Your Honor pleases.

The Court: Same ruling.

Mr. Patterson: I wish to interpose the objection that [85] counsel cannot hand to the witness—in addition to the other objections—documents composed of several pages and ask him a question of this kind; it's unfair to the witness and unfair to the defendant.

The Court: Objection overruled.

Mr. Patterson: Save an exception.

The Court: The Court will ask the witness, in view of the objection, however, Mr. Patterson: Mr. Witness, will you look at the questions and answers on the first page of the document and state whether or not there are any of those questions and answers which you want to dispute?

A. "Have you ever operated a gambling game at your home?" I don't want to make an answer now, sir.

The Court: Well, the question is whether that question was asked you there and the answer given that is there.

A. Yes, sir.

The Court: That's the only question that counsel is asking you, not what your statement is today but whether those questions and answers were put to you then and the answers given then. Do you understand?

A. Well, if I answer some of these questions "Yes" or "No" I might incriminate myself.

(Testimony of Richard Kazuo Mikami.)

The Court: Well, that isn't the point here. The only question put to you here, Kazuo; on reading the questions and answers on the first page, do you want to dispute the fact as to whether those questions and answers were given at that time in the County Attorney's office, or is that first page substantially correct as to questions and answers; what is your answer to that?

Mr. Patterson: Well, I think this man—Your Honor, I suggest that this man be advised as to his Constitutional rights; he might be involved in a perjury case. [86]

A. That's what I want to find out.

The Court: Well, he will be involved in a perjury, Mr. Patterson, if a foundation is laid when any witness would be under oath; but he has no Constitutional right here on the point of this question, as to whether or not he disputes any questions or answers that are presented to him that are recorded on that first page; if he does, he has a right to say so. The Court is not "short-changing" him on his right to dispute those questions and answers as if they were given at that time; that's the only point.

Mr. Patterson: We take an exception to the Court's position, if Your Honor pleases, most respectfully.

The Court: Your respectful exception is noted. Do you understand the question about that first page now, Kazuo?

A. Yes, sir.

The Court: The only question is whether or not

(Testimony of Richard Kazuo Mikami.)

that series of questions and answers was taken down at the Prosecutor's office, or whether they were not asked you then.

A. I don't remember every question, sir.

The Court: Well, what question do you not remember? That's what Mr. Lewis wants you to point out; on the first page, now.

A. "Have you ever operated a gambling game at your home?"

The Court: You don't remember that question being asked you at that time, is that it?

A. No; whether I said "Yes" or "No" I don't remember.

The Court: You don't remember whether you said "Yes" or "No"; but was the question asked you at that time?

A. Yes, I think so.

The Court: The question was asked, but you don't remember what answer you gave, is that what you're saying?

A. Yes, sir. [87]

The Court: Now, is there any other question on that page, or answer, that you have anything to say about or question about?

A. No, sir.

The Court: All right. Look at the second page; and the same thing.

Mr. Lewis: If the Court pleases, I think for the purposes of the record we might have it admitted for identification.

The Court: Marked for identification—what's the next number?

(Testimony of Richard Kazuo Mikami.)

Clerk: 14.

The Court: Prosecution's 14 (E) for Identification.

Mr. Lewis: And can each page be marked 14-1, 2, 3, 4?

The Court: Are they marked 1, 2, 3, 4?

Mr. Lewis: Yes.

The Court: On the second page of this document are there any questions and answers there, Kazuo, you want to raise any point about your memory or whether that occurred at the time?

A. "Who assisted in operating and running this game?"

The Court: Beg pardon?

A. "Who assisted in operating and running this game?"

The Court: Well, was the question asked you at that time?

A. I don't remember.

The Court: And you don't remember whether you answered such a question, is that what you're trying to say?

A. Yes, sir.

The Court: Any other?

A. "Did you have any partners?"

The Court: Do you remember whether or not such a question was asked you at that time? [88]

A. I don't remember.

The Court: You don't remember whether you answered such a question?

A. No.

The Court: Is that what you're saying?



(Testimony of Richard Kazuo Mikami.)

A. Yes sir.

The Court: All right; any other question and answer?

A. Do I have to tell every question and answer that I don't understand?

The Court: If there's any question or answer on that page that you have any doubt about, memory, whether it was asked you over there or whether you answered it over there, you are at liberty to so state.

A. "Were there any partners——"

Mr. Patterson (Interrupting): I understand my objection runs to the Court's questions the same as the point made.

The Court: That's understandable, Mr. Patterson, and is included in the ruling. I'm simply trying to get an idea of whether this witness understands questions; I'm not trying to become attorney in the case.

A. "Were there any partners associated with you in the gambling game?" "In what way?"

The Court: You don't remember such a question and answer?

A. Will you make it numbered so I can tell you easier? A lot of these things I don't remember.

The Court: Well now, Mr. Lewis, it's sufficiently clear to the Court what the progress with the witness will be. Now I ask you to confine your questions to the pages of the document that are concerned with the alleged inconsistent statements.

Mr. Lewis: Very well, sir. [89]

Q. Kazuo, will you examine page 2 of the Prose-



(Testimony of Richard Kazuo Mikami.)

cution's Exhibit 14 (E) for Identification, this statement; how many of these—which of these questions do you not recall and which ones do you recall?

Mr. Patterson: The caution is too general, if Your Honor pleases.

The Court: Read the question—excuse me, counsel; I was giving instructions to the Clerk at the time. This exhibit, by the way, ought to have a letter rather than a number for the Prosecution.

A. "Who assisted in operating and running this game?" "Myself."

Mr. Lewis: You don't remember that question or that answer?

A. I don't remember whether I answered that, sir.

Q. What other question or answer do you not recall, on that page?

A. "Did you have any partner?" "No."

Q. You don't recall that question and answer?

A. Yes, sir.

Q. What else?

A. "Whom did you have employed or in any way helping you in operating your game?"

Q. You don't recall that question?

A. I don't recall that question.

Q. Do you recall the answer?

A. I don't recall the answer.

Q. What else?

A. "Did you have any watchman?"

Q. Did you have any what?

(Testimony of Richard Kazuo Mikami.)

A. Watchman.

Q. You don't recall that question? [90]

A. No, sir.

Q. Or the answer?                      A. No sir.

Q. What else?

A. "Who are they?" "I can't tell you because some of them came in every day and others don't." "How many watchmen did you have?" "Three or four." "I told him that I was having a crap game."

Q. You don't recall that answer?

A. I don't know whether I said that or not.

Q. You don't know whether you said it or not?

A. No, sir. "Was there anybody present besides you and Caminos when you gave him this money?" "Not that I know of."

Q. You don't recall that question and answer?

Mr. Patterson: What was that answer, please?

Mr. Lewis: "Was there anyone present when you gave Caminos this money?" Answer: "Not that I know of."

The Court: What's the question now to the witness?

Mr. Lewis: The question to the witness was: Do you recall that? He said: "I don't recall it."

The Court: I want to correct the record, Mr. Reporter; this exhibit should be referred to as "Prosecution's Exhibit E for Identification instead of number "14."

Mr. Lewis: And let the record show that he was reading from page 2 of Prosecution's Exhibit E.

(Testimony of Richard Kazuo Mikami.)

Q. Kazuo, I now show you page 3 of Prosecution's Exhibit E for Identification, being page 3 of this same statement; will you examine the questions and answers on that page and tell us which ones you do not remember?

A. Your Honor, I don't know whether I can remember all these or not, because I was all excited up there.

The Court: Well, the point that you are asked now is [91] whether or not you dispute any of the questions or answers on that page as having been asked you and answered at that time in the Prosecutor's office.

A. "How did you come to give him this \$200.00?" "Well, I figured he was on the Vice Squad, so I gave him, he might overlook my place."

The Court: And what is your present statement about whether such a question or answer was asked over there?

A. I don't remember.

Mr. Patterson: Which page is he on now?

The Court: 3.

Mr. Lewis: 3. Kazuo, do you remember the question that you've just read?

A. I remember the question, sir, but I don't know what I said. "Because he might overlook my place."

Q. You remember the question but you don't recall the answer?

A. I kind of recall something like that.

Q. You say it was "something like that"?

(Testimony of Richard Kazuo Mikami.)

A. Yes, the question was something like "How did you come to give him this \$200.00?"

Q. You remember that question or a similar question? A. Yes, similar question.

Q. How about the answer?

A. I don't remember whether I said "he might overlook my place."

Q. Well, do you remember saying anything similar to that?

A. Similar to "overlook my place"?

Q. Yes. A. I don't remember.

Q. You don't remember that?

A. "What did you tell him before you gave him this money?" [92] "I am having a crap game sometimes."

Q. Do you remember the question?

A. I don't remember, sir.

Q. What? A. I don't remember it.

Q. You don't remember the question?

A. No, sir.

Q. And you don't remember that answer?

A. No, sir. "Was it in an envelope, or how?" "It was open."

Q. You don't remember the question "It was in an envelope, or how?" A. Yes sir.

Q. And your answer? A. "It was open."

Q. "It was open," you don't remember that?

A. No sir. "How long did he remain after you gave him the money?" "Another couple of minutes, then he went home."

Q. Do you remember the question?



(Testimony of Richard Kazuo Mikami.)

A. I don't remember that, sir.

Q. Do you remember the answer?

A. I don't know whether I said that or not. That's all.

Q. Those are the only questions and answers that you don't remember? A. Yes, sir.

Q. The other questions and answers on page 3 of Exhibit E you do remember? A. Yes, sir.

Q. Referring to page 6, do you recall the question: "How many times have you given Captain Caminos money?" And the answer: "Once." [93]

A. I don't know whether I said "once"; I don't remember that.

Q. You don't remember that. As a matter of fact, how many times did you give Captain Caminos money?

A. Only that once when I paid him for the house.

The Court: Will you hand that to be marked now by the Clerk as an identification only, the document.

Mr. Lewis: I think the record should show that that last question that I asked him about "How many times have you given Captain Caminos money?" appears on page 6 of this document.

The Court: That's the page that you were examining him on.

Mr. Lee: May I have that answer in response to that last question?

The Court: "Once."

Mr. Lee: He said "Once"?

The Court: "Once."



(Testimony of Richard Kazuo Mikami.)

Mr. Lee: Then he said something else I didn't get.

The Court: Mr. Reporter, will you read the last question and answer?

(Reporter reads second to last question and answer.)

The Court: And the next question?

(Reporter reads last question and answer.)

Mr. Lewis: Kazuo, are you afraid of incriminating yourself today?

Mr. Patterson: I submit that—objected to upon all the grounds previously stated, upon the further ground that it's argumentative, improper, unfair, prejudicial.

The Court: The witness made some such observation in his answer, Mr. Patterson, and counsel has a right to clarify whether that is the position.

Mr. Patterson: We save an exception. [94]

Mr. Lewis: May we have the question repeated, if the Court please?

(Reporter reads last question.)

A. Yes, sir.

Q. Kazuo, would your answers be any different if you were not afraid of incriminating yourself?

Mr. Patterson: Objected to upon the ground that it's improper, it's prejudicial, irrelevant, incompetent; upon all the grounds previously stated, if Your Honor pleases.

The Court: Objection sustained.

Mr. Lewis: No further questions.

(Testimony of Richard Kazuo Mikami.)

Cross-Examination

By Fred Patterson, Esq.:

Q. And, Mr. Kazuo, you were shown a document containing some questions and answers a while ago by Mr. Lewis which you read from and which is marked for identification Prosecution's Exhibit E; and you I think stated that that was taken in the early part of the year 1946, in April, is that correct?

A. Yes, sir.

Q. And did you ever sign that document?

A. I don't remember signing it, sir.

Q. Did you sign it? I'll show it to you.

A. I didn't sign it.

Q. You didn't sign it.

Mr. Patterson: No further questions.

The Court: Any further questions, Mr. Lewis?

Mr. Lewis: No further questions.

The Court: Take a short recess, gentlemen.

(Recess—11:08 to 11:17 a.m.) [95]

(At conclusion of this last recess the Reporter was not called; when he arrived in the courtroom the Court was on the Bench, the jury present, with counsel and the defendant, and Mr. Peter A. Lee was concluding some motion.)

The Court: Are you through with the grounds of the motion?

Mr. Lee: Yes, sir.

The Court: Motion is denied.

6. The testimony of Territory's witness, Jose Tantog; beginning with the line on page 818 of said transcript which reads: "Jose Tantalog" and ending with the line on page 825 of said transcript which reads: "Mr. Lewis: No further questions."

### JOSE TANTOG

being first duly sworn as a witness on rebuttal in behalf of the prosecution, testified as follows:

#### Direct Examination

By Dudley C. Lewis, Esq.:

Q. Will you state your name?

A. What's that, sir?

Q. What's your name?

A. My name, Jose Tantog.

Q. Where do you live, Jose?

A. I'm living down Waialua.

Q. By twin bridges?

A. Behind fire station.

Q. How long have you lived there?

A. Since 1939.

Q. And do you know the defendant Mr. Caminos?

A. Not all of them, only him I know. [96]

Q. Only him you know; you know Clarence Caminos?

A. No, only him; only Caminos I know, but the first name I don't know.

Q. Do you see him in the courtroom?

(Testimony of Jose Tantog.)

A. Yes, that's the one there (indicating).

Mr. Lewis: Let the record show that the witness has indicated the defendant.

Q. How long have you know him, Tantog?

A. Since I have been caught when I running a game without any permission.

Mr. Patterson: I ask that that answer be stricken upon the ground it's not responsive.

The Court: Motion to strike will be denied.

Mr. Patterson: Save an exception.

Mr. Lewis: May we have the answer read?

Mr. Patterson: May we further object to it, Your Honor, upon the ground it is irrelevant, immaterial and incompetent, not within the issues of this case, not rebuttal testimony, does not—is not proper evidence with reference to impeachment if that is why it is being put out at this time, and upon the ground that related incidents of other crimes of similar nature not properly in evidence in this case in any event, and especially not such upon rebuttal, and upon the ground that they cannot at this time show any statements contrary to the impeaching questions which were asked by the defendant Caminos when he was a witness in this case, and that they are not and should not be permitted to ask any such questions and they are bound by the statements of Clarence Caminos which were asked on cross-examination which sought to impeach him, in the same way that any other witness is bound. May the answer be stricken; the question in this case, if Your Honor pleases, did not call for any answer



(Testimony of Jose Tantog.)

such as was given by the witness; Mr. Lewis asked him how long he had known him, then he made some answer [97] which I didn't understand, but it was not along that line.

The Court: The Court will consider your objection as being interposed before the answer. Have you any observations in regard to your position on that, Mr. Lewis, to the objection made?

Mr. Lewis: To Mr. Lewis?

The Court: Yes. You heard the objection made by counsel?

Mr. Lewis: I did.

The Court: Have you any answer?

Mr. Lewis: I have.

The Court: All right.

Mr. Lewis: If the Court please, this witness is Jose Tantog, about whom two relations with the defendant were brought out on cross-examination. I agree with counsel as to the general rule of law that irrelevant matters brought out on cross-examination cannot be made the basis for impeachment. However, where the matters are relevant and go to the issues in the case they can be; this goes to show the intent, the scheme, the general plan, the relationship of this defendant to this type of offense; and I'd like to refer the Court to——

Mr. Patterson: We'd prefer any argument in the absence of the jury as a matter of law, Your Honor; I make that request.

The Court: Will you open to the book and pass



(Testimony of Jose Tantog.)

the book up to me so that I can read it in the absence of the hearing of the jury?

Mr. Lewis: I will.

Mr. Patterson: May we have opportunity to read it?

The Court: Yes, after I have read it I'll pass it to you, Mr. Patterson. [98]

Mr. Patterson: I would like to submit authorities too, Your Honor.

Mr. Lewis: I'd like to call attention of the Court to the general statement of 70 C. J., pages 1160, 1164, and particularly as to what constitutes collateral matter which is noted on page 1165. (Handing volume to the Court.)

The Court: Let the record show that volume 70, Corpus Juris, is before the Court.

The Court (After reading in silence): One or two matters in those that you referred to me that I'd like to look up in the recess. We'll take our adjournment at this time until 2:00 o'clock this afternoon.

(Recess—11:55 a.m. to 2:12 p.m.)

The Court: Let the record show that the jury, counsel, defendant, and the witness are present. Mr. Reporter, what was the matter pending when we adjourned?

(Reporter reads last remarks of the Court prior to the foregoing recess.)

The Court: I think we were just presented with

(Testimony of Jose Tantog.)

objection to a question; what was the question, Mr. Reporter, to which there was objection?

(Reporter reads last question and answer.)

The Court: The objection made is denied.

Mr. Patterson: Save an exception, if Your Honor pleases.

The Court: Exception is allowed.

Mr. Lewis: Tantog, what year you first meet Caminos?

A. It was 1944, I think, November or December, I'm not sure on that.

The Court: Tantog, you work hard talk, talk these men so they can hear you, eh?

A. Yes, sir. [99]

Mr. Lewis: Tantalog, talk loud so all people of the jury can hear you, eh? A. Yes, sir.

Q. Tantog, where you first meet Caminos?

A. That night that I was caught, in my house.

Q. You met him in your house?

A. Yes, in my house.

Q. What was going on at that time?

A. While I was running the game.

Q. What kind of game?

A. Dice game—7-11.

Q. People play money in that game?

A. Yes.

Mr. Patterson: May my objection run to all this line of the testimony the same as the other witness.

The Court: Yes, Mr. Patterson, and your exception also.

(Testimony of Jose Tantog.)

Mr. Lewis: How long were you running that game, Tantog?

A. When I caught it's about one week.

Q. About one week?

A. About one week, I think.

Q. Did you run the game again?

A. No, since that time I quit; that time I gave up, I quit 'till now, no play no more, I no run no more.

Q. Before that you met Caminos? A. No.

Q. You never seen him before?

A. No; I have seen him, but I don't know him yet that time.

Q. Tantog, you ever give any money Caminos?

A. Yes.

Q. How much?

A. I don't know how much altogether, that's only one time. [100]

Q. How much you give?

A. First I remember 20 dollar bill I give him about one o'clock in the night when he came with one policeman.

Q. That policeman's name Moses Piahia—Moki?

A. I don't know—yes, Moki was with him too.

Q. Moki was with him too?

A. Yes, the one who call me down to quit; Caminos down in the car.

The Court: What time is he talking about?

Mr. Lewis: When was that time?

A. You mean the date?

Q. Yes.

(Testimony of Jose Tantog.)

A. I don't know the date, I forget.

Q. Do you remember the year?

A. The year is 1944.

Q. 1944? A. 1944, I think.

Q. What you give him the money for?

Mr. Patterson: Object to upon——

A. (Interrupting): Well, I was there to run the first time?

Mr. Lewis: You were there to run what?

A. Run game.

Q. Run game? A. Run game, yes.

Q. Who told you to run game?

A. Caminos.

Q. Caminos?

A. Yes. After I got caught I paid bill \$130.00 the first night we got caught over there; next time he came with two policeman, three with him—Dupont, Moki, and him.

Q. Who was the first one—Dupont? [101]

A. Dupont, Moki and Caminos.

Q. And what happened?

A. Well, he tell me the story he was so sorry they been raid us that night—"Look Catalino; in order to catch up that money you better run the game;"——

Q. (Interrupting): He said "Look Catalino"?

A. Yes; he told me "You look Catalino, he's running game, he pay fine but he catch up the money."

Q. Mr. Tantog, you ever have one boat?

A. Yes, I get.



(Testimony of Jose Tantog.)

Q. How big that boat?

A. It was 12 feet, I think.

Q. One racing boat? A. Racing boat, yes.

Q. What happen that boat?

A. Well, that was happen that I give to Caminos.

Q. How you give Caminos?

A. He was asking me the boat. After three days I think he let me play like that I was a little bit—feel little bit better because he let me run the game and I think I can make money, and after two or three days he ask me the boat, he like buy, I say that no fair. Then after that he come back see again, tell me story about the boat, he like the boat, and after that as I was still going yet I give him the boat.

Q. You give him the boat? A. Yes.

Q. What he give you?

A. No nothing, just the chance to run, that's all, that's what I figure.

Q. He never give you any money for the boat?

A. No. [102]

Q. He no give you \$10.00? A. No.

Q. Never 5 cents? No one cent.

Q. Not one cent? A. Not one cent.

Q. What time you give him the boat, what year?

A. I don't know, I forget already, even the day I don't know what date was that, what month was that.

Q. What year you think?

A. About the end of the year, the earliest part of 1945, that's what—because not long after that.



(Testimony of Jose Tantog.)

Q. You say late 1944 or first part 1945?

A. Yes.

Q. Is that right? A. Maybe 'round there.

Mr. Lewis: No further questions.

\* \* \*

### CATALINO PRIOPIOS

7. The testimony of Territory's witness, Catalino Priopios, beginning with the line on page 839 of said transcript which reads: "Q. What you do for living then, 1945?" and ending with the line on page 843 of said transcript which reads: "Mr. Young: No further questions."

Q. What you do for living then, 1945?

A. Gamble.

Q. You gamble, eh? A. Yes, sir. [103]

Q. You make money gambling?

A. I make money little bit.

Mr. Patterson: That's objected to upon the ground it's irrelevant, immaterial and incompetent.

The Court: Objection overruled.

Mr. Young: What kind of gambling games?

A. 1945, that chicken fight.

Q. Chicken fight? A. Yes, sir.

Q. And where you hold that chicken fight, what place?

A. The last time 1945, the last time, Ondo pineapple, the last time.

Q. You know Caminos? A. I know.

Q. Is he in the court today? A. Yes, sir.

Q. Where is he?

(Testimony of Catalino Priopios.)

(Witness indicates.)

Mr. Young: May the record show——

Mr. Patterson (Interrupting): Ask him to have the man stand up; I don't know who he's pointing to.

The Court: Which man?

A. That man (indicating).

Mr. Young: With the shirt, or the coat?

A. Coat.

The Court: Are you satisfied, Mr. Patterson?

Mr. Patterson: Yes, Your Honor, I'm satisfied; he was pointing at me before.

Mr. Young: When did you first become acquainted with Caminos? (question interpreted to the witness). A. 1932. [104]

Q. Did you see him in 1945? A. Yes, sir.

Q. When you were running a gambling game did you see him? A. Yes, sir.

Q. Now, did you ever have any talk with Caminos about gambling games and cockfights?

Mr. Patterson: We understand, if Your Honor pleases, that our objection runs to all this line of evidence and we have the same exception as to the previous witnesses; do I understand that?

The Court: Yes, your objection may go to this in the Court's ruling that the evidence is admissible upon the theory—to illustrate the theory of the prosecution that there was a general scheme of corrupting officers as police officers, and for that purpose alone.

(Testimony of Catalino Priopios.)

Mr. Patterson: And may we have the further objection, if Your Honor pleases—I don't know whether it's distinctly in there or not—that any evidence of this kind, if admissible at all, would be offered—should have been made by the prosecution in its case-in-chief, not as rebuttal testimony; it rebuts nothing.

The Court: The fact that it's appearing in rebuttal, the objection to that the Court will overrule.

Mr. Patterson: Exception, Your Honor.

(The last question is interpreted to the witness.)

A. First time Mr. Caminos send one policeman, it's Moki, and Moki told me——

Mr. Patterson: I object to what Moki told him.

The Court: Objection sustained. Never mind what Moki said; it's Caminos.

Mr. Young: You ever talk to Caminos—not Moki, to Caminos? [105]

A. Yes, but the game stopped.

Q. The first time you talked to Moki?

A. Moki he come my house, I tell him——

Mr. Patterson: Objected to if Your Honor pleases, upon the ground it's irrelevant, immaterial and incompetent.

The Court: What Moki told you, no good, pau. What Caminos tell you, that's the question.

A. He told me "you run the game, you no scared."

Mr. Young: Who told you?

A. Mr. Caminos.

(Testimony of Catalino Priopios.)

Mr. Patterson: What was the answer, please?

(Reporter reads the foregoing answer: "He told me 'You run the game, you no scared.'")

A. And he charge me for \$25.00 a week.

Q. (By Mr. Young): Who charge you \$25.00?

A. Mr. Caminos.

Q. Did you pay him \$25.00? A. Yes, sir.

Q. How many weeks?

A. Every week \$25.00, and I run for my own game almost one year; Christmas time double, Christmas and Sunday, well, I pay double—25-25.

Q. You give to him personally?

A. I give him.

Q. Personally? A. Yes, I give him.

Q. Every week?

A. Every week he come, Sunday night some time——

The Court (Interrupting): What year?

A. Start game 1943.

Q. (By Mr. Young): And you paid for one year after that, is [106] that right?

A. About one year.

Mr. Young: No further questions.

\* \* \*

## EXCHANGES BETWEEN COURT AND COUNSEL

8. The exchanges between Court and counsel appearing on the following pages of said transcript and there indicated by being inclosed in brackets, to wit:



pp. 73, 102 and 103, 115, 140, 245 and 246, 337 to 339 (inclusive), 362 and 363, 528 and 529, 813 and 814, 830:

(from page 73)

The Court: That's not the testimony of the witness, and it's a deliberate misconstruction of his testimony. He said sometimes three men.

\* \* \*

(from line 2, page 102, to line 30, page 103.)

The Court: I suggest, Mr. Patterson, you do not interrupt the witness and make objection when his answer is unfinished; you're taking advantage of the witness, you're taking advantage of counsel, you're taking advantage of the Court; there's an orderly way to present an objection.

Mr. Patterson: Most respectfully, Your Honor—when this man says “he gave me the impression” I can't figure that out ahead of time—I most respectfully except to the remarks of the Court and assign them as error, if Your Honor pleases.

The Court: Your objection is noted and the exception allowed. The Court requests you, in a very courteous tone of voice, Mr. Patterson, to please wait until the man has finished his answer; you'll be given an adequate hearing with your objections and the Court will make its ruling.

Mr. Patterson: I do say, if Your Honor pleases, that the remarks made to me a while ago are preju-



dicial, and I assign them as error; I most respectfully do that.

The Court: Mr. Reporter, will you read to where we got before Mr. Patterson interrupted. [107]

(Reporter reads last answer.)

A. (Continuing): The impression he gave me was sort of that at the back of those doors there was something, maybe paraphernalia; I said "Yes" to his question about the doors leading outside so he won't ask me to open the doors; and that stopped there.

Q. Mr. Au——

Mr. Patterson (Interrupting): Just a minute. I respectfully submit to the Court the point I made was that this man was going to say in front of this jury what his impressions were; I assign that—I ask that that be stricken and the jury instructed to disregard it, it's his secret impression, it is not evidence, and that was the time I got up before counsel so that that would not go to the ears of this jury; I don't think it has any place there, and I respectfully and courteously request this Court to strike; that's exactly what I wanted to object to, and I make the point that the only way. Your Honor, I could stop that was to interrupt this witness when he began to talk about something which wasn't in answer to Mr. Lewis' question. To my mind it's a very serious situation; I'm sorry I'm party to it, but in fairness to my client I have to take exception to it, and I ask that that be done at this time.

The Court: Mr. Reporter, will you read slowly

to me the words just after the witness' "impression."

(Reporter reads portion requested, of witness' last answer.)

The Court: The motion to strike will be denied.

Mr. Patterson: To which we note an exception, if Your Honor pleases.

The Court: Exception allowed. And, gentlemen of the jury, in view of the past few moments that you've observed, recall to your mind your answers to the questions of counsel [108] on your voir dire, that arguments and matters arising between Court and counsel in this trial should not be in any respect used by you for or against the defendant or the Territory as parties to the case; but the Court is simply trying between itself and counsel, on his part to preserve his record in the court, to preserve an orderly trial, so that you'll lay it to the Court and counsel and not to their client.

\* \* \*

(from lines 23 to 25, page 115.)

The Court: The remark may be stricken; and, gentlemen of the jury, you may disregard the instructions to the Court given by Mr. Patterson.

\* \* \*

(from lines 7 to 20, page 140.)

(Pause.)

The Court: The Court will ask counsel to proceed with the examination.

Mr. Patterson: Well, I was checking something, if Your Honor pleases.

The Court: Yes, but, Mr. Patterson, it's every other question checking, but please get busy and get through with the checking.

Mr. Patterson: I take exception to the rebuke; it isn't every other question; it's the second time this morning, and I wish the record will so show.

The Court: The record should show the truth; it's more than the second time, Mr. Patterson.

Mr. Patterson: As I remember it's the second time. [109]

(from line 29, page 245, to line 5, page 246.)

The Court: The Court would not only refuse to re-open but also refuse the line of examination as not within the scope of any proper cross-examination of this witness in going into an entirely foreign incident as to which there would be no opportunity in this case to go into the details; simply a diversion of the attention of the jury on the issues before them, not having any direct bearing upon the credibility of this witness.

\* \* \*

(from line 19, page 337, to line 8, page 339.)

The Court: (Interrupting): The Court will cut out the argument now in that fashion, Mr. Patterson. The sole question is one of law and not one of an argument to the Court on the credibility of witnesses; the question is one of law, whether you can manufacture opportunity for evidence by specify-

ing names in a cross-examination on a collateral issue, that's the question of law involved. The Court will permit the one type of question from this witness and will lay the precedent if you have others of the same character, to simply ask the witness whether or not he received any division of the spoils from Mr. Clark on any occasion.

Mr. Patterson: Thank you, Your Honor. Will you read that statement of His Honor's to me——

\* \* \*

The Court: Yes; let me give it through, Mr. Patterson. I'll caution the jury that the Court is permitting this testimony; we're not trying the issues of other collateral matters, whether they did or did not happen; we're trying simply the issue as to Mr. Caminos, and this issue is as to the credibility of Mr. Clark as addressed in this particular case. [110]

Mr. Patterson: Can I get the first part of Your Honor's statement?

The Court: Yes.

Mr. Patterson: I wish to take exception and assign as error the remarks of the Court that I took advantage of an opportunity to manufacture evidence, as being prejudicial to the defendant in this case; I have not done that; I didn't even examine the witness Clark, Your Honor, I didn't even examine him so I couldn't be guilty of manufacturing evidence.

The Court: Mr. Patterson, you are a member of the group of attorneys defending this case. The



Court's remark was that the proposition of law before the Court was whether the defense could manufacture opportunity for additional witnesses on collateral matters by specifying on cross-examination names, and that it was a question of law for the Court, and I am resolving that question of law that in connection with the transactions alleged to have emanated from Paul Au of the delivery of money to Mr. Clark that I am permitting you to ask this witness or any other witness that was named in that history whether or not he received any split of the spoils alleged to have been given.

Mr. Patterson: In connection with that, Your Honor, since Your Honor's comment I asked that it be read, I wasn't sure just exactly what was said before, but as to that I now withdraw that request. I most respectfully, if Your Honor pleases, assign as error and prejudicial to this defendant the statement of the Court to the defense, to the other attorneys besides myself, on the attempt to manufacture a suit and present evidence.

The Court: Exception may be noted. And again, gentlemen of the jury, the controversy between Court and counsel is not evidence in the case. [111]

\* \* \*

(from line 22, page 362, to line 4, page 363.)

Mr. Patterson: Will counsel admit that it is?

Mr. Young: If the witness isn't sure himself, how can I admit it?

Mr. Patterson: You brought the pictures to court.



Mr. Young: You're asking the witness' opinion, not mine.

Mr. Patterson: I'm asking you for a simple concession.

The Court: Proceed with the examination of the witness, Mr. Patterson. The Court cautions you again not to enter into controversies with counsel as side remarks.

Mr. Patterson: I apologize to the Court; I was wrong on that occasion. And I understand, then, that counsel refuses to admit that this is the wall 'round Honolulu Rooms?

The Court: There's no occasion to call for an admission; you're examining the witness.

\* \* \*

(from line 1 to 11, page 528.)

The Court: The record of Mr. Clark in the Police Department isn't primarily admissible evidence; it would have been available on cross-examination of Mr. Clark in connection with that, Mr. Patterson, but you can't impeach and discredit the witness by a hearsay record on the files of his employment office.

Mr. Patterson: I can show he was sick and in bed, though, when he was supposed to be giving bribes.

The Court: Well, you were given opportunity in your examination of the witness for the purpose of producing impeaching evidence of that [112] character.

(from line 12, page 528, to line 5, page 529.)

Mr. Patterson: I didn't know it at the time, if your Honor pleases, I wasn't so informed.

The Court: Well, the possibility of investigating it was known and you knew for months he was going to be a witness.

Mr. Patterson: I didn't know it at the time, and I've ascertained it since, as lawyers do learn things in the course of a trial.

The Court: Well, the Court can't delay the trial for the lack of diligence of counsel.

Mr. Patterson: I take exception and assign the ruling of the Court as error and prejudicial.

The Court: We expected errors; exception is noted. Have you got through with your offer, your request?

Mr. Patterson: Yes.

The Court: The Court will not make any ruling ordering the production.

(Open Court.)

Mr. Patterson: Then, as I understand it, the Chief of Police is not required to bring this record here in obedience to the subpoena as to which there is some misunderstanding about?

The Court: That's correct; the Court will not order the production of the document under the ruling made.

Mr. Patterson: Save an exception.

The Court: Exception has been made and [113] noted.

(Excerpts from pages 813 and 814.)

Mr. Patterson: We object to this upon the ground; upon all the objections stated; upon the ground that they are really to collateral matter on rebuttal testimony, not even brought out by us; in other words, since—we respectfully submit, if your Honor pleases, since we've closed our case they're trying an issue upon their own witness; they put a witness on the stand to testify and now they're trying the issue whether or not that man was telling the truth; this defendant is not bound by any testimony which was taken out of his hearing or out of his presence; not impeachment.

The Court: Mr. Patterson, the Court dislikes the necessity to call your attention to the obvious thing that you know, that any party putting on a witness who is obviously surprised by the answers given on the witness stand by reason of the fact that such party is bound by that witness' statements unless they desire to impeach him from former inconsistent statements, the law allows a party who is thus surprised to impeach his own witness under specific rules of the statute, to it, calling the witness' attention to the time and place of the supposed inconsistent statement, giving him an opportunity to be heard thereon, and if the witness does not clearly admit the giving of the former statement, that the party has the right to prove, if he can, from any witness, the giving of the former inconsistent statement, a rule which you've been, as an attorney for more than 30 years, conversant with and its applicability here; and the Court is giving this instruction

openly in the presence of the jury by reason of the type of argument that you've just made openly, as though it were something being tried by the prosecution that's out of order; and the Court wants the record to show, and if the Court is in error to give you the benefit of that error, to correct the statement in [114] the presence of the jury, that the law is that a party may by proper showing impeach his own witness, if having produced him under the responsibility of vouching for his truth they are taken by surprise and desire to show to the jury that they are not satisfied with the present truth of the witness' answers given. Now you may have your exception to the Court's pronouncement of law in the presence of the jury on that issue.

Mr. Patterson: And may I have an exception to the Court's statement that that is my knowledge, that I know that; and I most humbly and respectfully say to the Court that I do believe the rule is otherwise; and I assign that remark of the Court as error.

(Excerpt from page 830.)

The Court: You've heard the objection, Mr. Patterson; the Court suggests that you give the witness a chance to answer one question at a time.



In the Supreme Court of the Territory of Hawaii,  
October Term, 1949

Wednesday, June 14, 1950

Argument, 10:00 A.M.

Nos. 2680 and 2681, Consolidated

TERRITORY OF HAWAII,

Plaintiff-Defendant in Error,

vs.

CLARENCE C. CAMINOS,

Defendant-Plaintiff in Error.

(Cr. Nos. 19015 and 19018. Error to circuit court,  
first circuit, Hon. A. M. Cristy, Judge.)

The Court: Hon. Samuel B. Kemp, Chief Justice;  
Hon. Louis Le Baron and Hon. Ed-  
ward A. Towse, Associate Justices.  
Mrs. Leoti V. Krone, Clerk.

Counsel: Fred Patterson, Esq., Peter A. Lee, Esq.,  
and Oliver P. Soares, Esq., for Clarence  
C. Caminos, plaintiff in error.  
Allen R. Hawkins, Esq., Assistant Public  
Prosecutor, for the Territory of Hawaii.

Court convened at ten o'clock a.m.

Chief Justice Kemp called the case for argument,  
and counsel announced that they were ready.

Three counsel were present for defendant-plain-  
tiff in error, Messrs. Fred Patterson, Peter A. Lee



and Oliver P. Soares, the chief justice giving them permission to each present an argument, although stating that ordinarily two only were permitted to argue for one side.

At 10:05 Mr. Peter A. Lee opened the argument for defendant, presenting the points of hearsay evidence, specific crimes being permitted in evidence against the defendant, and variance. During the course of his argument he cited the case of *Harris v. Tate*, 204 P. (2d) 305, 308, which is not in his brief. He concluded his argument at 10:55 a.m.

Mr. O. P. Soares followed immediately, his portion of the argument involving the refusing of requested instructions by the defendant and the giving of certain instructions requested by the plaintiff, he stating that he would confine his argument to points 12, 13 & 14 to the refusal of the court to give certain instructions requested by the defendant, points 12 to 16, inclusive, and to points 15 [116] and 16 to the giving by the court over objection of defendant of certain instructions. His argument was concluded at 11:15 a.m.

Mr. Fred Patterson stated he will make the reply argument to Mr. Hawkins.

Thereupon, at 11:15 a.m., Mr. Allen R. Hawkins, Assistant Public Prosecutor, for the Territory, started his reply to the arguments presented by defendant's counsel, during which he referred to pages 90-93 and 93-98 of the record on appeal, reading from portions of it, and replying to each point counsel for defendant had argued upon, taking them categorically. He cited the cases of *Commonwealth*

v. Kearney, 308 Mass. 481, 33 N. E. (2d) 303 (1941), and State v. Tighe, 289 S. W. 829 (Mo. 1926), not in his brief, concluding his argument at 11:50 a.m.

Mr. Fred Patterson immediately followed Mr. Hawkins in reply, concluding his remarks with the submisison and hope that the court will find that the defendant has been injured, that he should be given a new trial, and that he should go free, as his counsel believe he should, finishing at 12:04 p.m.

Mr. Soares then replied very briefly to Mr. Hawkins re no fabricated testimony, which he stated is a fact submitted by both sides, concluding at 12:05 p.m.

Chief Justice Kemp then stated that since this concludes the argument, the matter will be taken under consideration, and the court will now adjourn until tomorrow at 10:00 a.m.

Court thereupon adjourned at 12:06 p.m.

/s/ LEOTI V. KRONE,  
Clerk.

A true copy. [117]

In the Supreme Court of the Territory of Hawaii,  
October Term, 1949

Nos. 2680 and 2681

TERRITORY OF HAWAII

vs.

CLARENCE C. CAMINOS

Error to Circuit Court, First Circuit,

Hon. A. M. Cristy, Judge

Argued June 14, 1950.      Decided August 28, 1950.

Kemp, C. J., Le Baron and Towse, JJ.

Criminal Law—bribery—specific intent.

Where an indictment charging the defendant with receiving a bribe is framed in the language of the statute alleging a specific corrupt intent, proof of that question is thereby placed directly in issue.

Criminal Law—evidence—admissibility of other separate and independent crimes or attempted crimes of bribery.

Under an indictment charging the defendant with receiving a bribe, evidence of other separate and independent crimes of bribery or attempted bribery committed by the defendant at or about the same time and not too remote, is admissible upon the issue of the particular intent, knowledge or purpose of the defendant

with respect to the crime for which he is on trial. [119]

Criminal Law—evidence—degree of proof of other separate and independent crimes.

Proof of the defendant's guilt of other separate and independent crimes than that for which he is on trial is sufficient if the evidence thereof proves or tends to prove the defendant guilty of the commission of such other crimes. The evidence need not of itself establish the defendant's guilt of those crimes beyond a reasonable doubt. [120]

#### OPINION OF THE COURT BY TOWSE, J.

Following trial by jury upon two consolidated indictments of seven counts, each charging the receipt of bribes, the defendant was found guilty and sentenced to aggregate terms of imprisonment and fines of ten years and \$5,000, respectively.

The first count of the first indictment alleged: "That Clarence C. Caminos, at the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Honorable Court, on or about the 18th day of August, 1945, he, the said Clarence C. Caminos, being then and there an executive officer, to wit, a duly commissioned, appointed and acting police officer of the Police Department of the City and County of Honolulu, Territory aforesaid, in disregard of his office as a police officer, and perverting the trust reposed in him, and for the private gain of him, the said Clarence C. Caminos,



under color of his office, did, unlawfully, corruptly, wilfully and feloniously take, accept and receive of one Paul Au, then and there being, the sum of Nine Hundred Dollars (\$900.00) in money, a more particular description of which is to the Grand Jury unknown, as a bribe, gift and gratuity under an agreement and with an understanding that he, the said Clarence C. Caminos, would not, in the exercise of his function in his capacity, as a police officer aforesaid, apprehend and arrest the said Paul Au, Alfred B. T. Choy and Robert Hosoi, also known as Harry Hosoi, and divers and sundry other persons, to the Grand Jury unknown, for conducting, carrying on, playing and engaging in gambling and gambling games in the City and County of Honolulu, in violation of and [121] prohibited by the laws of the Territory of Hawaii, which matter of the said apprehension and arrest was then and there pending and which might by law come and be brought before him, the said Clarence C. Caminos, in his official capacity aforesaid, and did then and there and thereby commit the crime of receiving a bribe, contrary to the form of the statute in such case made and provided.”

Except as to the date of the receipt of the alleged bribe and the amount thereof, the other four counts of the indictment are laid in the same words as the first count.

The first indictment alleges payments and the receipt of bribe moneys paid to the defendant during the period August 18, 1945, to and including September 16, 1945, at seven-day intervals. The



dates and the amounts laid in the respective counts are:

Count 1, on or about August 18, 1945, the sum of \$900; count 2, on or about August 25, 1945, the sum of \$500; count 3, on or about September 2, 1945, the sum of \$2,000; count 4, on or about September 9, 1945, the sum of \$500; count 5, on or about September 16, 1945, the sum of \$900.

The second indictment contains two counts and is laid in the same words as the first indictment. Count 1 alleges receipt of \$3,900 on or about January 6, 1946; count 2, the receipt of \$2,100 on or about January 13, 1946.

The crime charged in each of the seven counts is defined in section 11071 of Revised Laws of Hawaii 1945, as follows:

“Every executive, legislative, judicial or civil officer, or any master in chancery, or any person acting or summoned as a juror; or any appraiser, referee, arbitrator or [122] umpire, who corruptly accepts any gift, gratuity, beneficial service, or act or promise of either, under an agreement or with an understanding that he shall in the exercise of any function in his capacity as aforesaid, vote, decide, or act in any particular manner in any cause, question, proceeding or matter pending or that may by law come or be brought before him, shall be punished by imprisonment at hard labor not more than five years, or by fine not exceeding one thousand dollars.”

The seven separate crimes are temporarily laid as consecutive weekly bribe payments during two

periods; the first period, the latter part of the year 1945; and the second period, during the month of January, 1946. Though not alleged in either indictment as a continuing offense, the theory of the prosecution and the evidence in support thereof were both of that nature and character. All seven counts being identical in terms and verbiage, except as to dates of the separate specific offenses and amounts, the two indictments were consolidated for trial for the reason, *inter alia*, that in each indictment the same persons were involved in what appeared to be one single transaction of bribe giving and bribe taking.

Upon conviction under each indictment writs of error issued. A motion to consolidate the causes in this court was granted. There are forty-six assigned errors in each case. Of these seventeen are relied upon and, as consolidated, will be considered jointly.

Assignment of errors numbered 20, 21, 22, 23 and 24, being specified errors relied upon numbered 4, 5, 7, 8 and 9, are directed to the receipt in evidence of the testimony of [123] five witnesses on behalf of the Territory of Hawaii. The plaintiff in error alleges prejudicial and reversible error in the admission of their testimony upon the ground that the testimony constitutes evidence of the commission, by the defendant as well as by another person, of other separate and independent crimes than that for which he was then upon trial.

We have meticulously reviewed the record, considered all the specifications of errors relied upon, and conclude that it is upon specified errors num-

bered 4, 5, 7, 8 and 9 that disposition of the two causes rests. We find no merit in the contentions urged in respect of the other specifications, and that no error was committed by the trial court in respect of the remaining twelve.

We are not here concerned with the rule of evidence permitting inquiry of a witness of prior criminal convictions as affecting his credibility or the weight of his testimony. The question presented is whether the admission in evidence of the testimony of the five witnesses as proof of the commission by the defendant of separate independent crimes, other than those for which he was indicted and tried, constituted prejudicial and reversible error under the facts presented by the record. The substance of their testimony was:

The witness Thomas G. Rodenhurst testified that in the month of November, 1945, he was a lieutenant in the Honolulu Police Department in charge of the Pearl City police station, and the defendant was captain of the vice squad in Honolulu; that the defendant came to Pearl City and approached the witness upon the subject of assisting him, the defendant, in establishing cockfighting under police protection in that [124] district. He assured the witness that "you'll get yours." The cockfighting was to be transferred from district to district thereafter to evade detection. Defendant was to make all arrangements with the witness' superior officers in the country district. The witness testified that he would have no part of the scheme, and refused to participate.

The witness Lawrence C. Loo, an admitted professional gambler, testifying under immunity from prosecution, corroborating the testimony of William C. Clark, the principal witness for the prosecution, stated that he operated a gambling game in Honolulu during the months of August and September, 1945, until the early part of 1946; that on behalf of the establishment he paid William C. Clark, a police sergeant on the vice squad then serving under the defendant, the sum of \$700 per week for protection against vice squad raids. He further testified that he collected the sum of \$700 per week from another professional gambler in Honolulu during the year 1945 and also gave this money to Clark for the same purpose. The witness was not an owner or partner in the latter establishment, but acted only as a messenger for delivery of the money to Clark without remuneration, and as an accommodation to the owner. The payments were made under an arrangement whereby the witness met Clark each week and gave him the sum of \$1,400 in currency in two rolls of \$700 each. These payments continued for a period of ten months.

The witness Richard Kazuo Mikami, on rebuttal, testified that during the months of November and December, 1945, he was employed at a service station in Pearl City at which the defendant purchased gasoline; that on one occasion at the service station in the month of November, 1945, he gave the sum of \$200 to the defendant for prior rental of the defendant's [125] beach cottage at Mokulei, Oahu. He had occupied the cottage for a time during the



years 1943 and 1944. This witness could not recall whether at the time of tender of the \$200 he told the defendant that the money was for police protection in operating a gambling game in the rear of the service station. The prosecution was apparently surprised at this failure of recollection. Thereupon attempt was made to impeach the witness by a showing that he had in fact told this to the defendant in making a prior inconsistent statement in the office of the public prosecutor. The witness, however, maintained that he tendered the sum for rental of the beach cottage, the defendant initially refusing to accept it but later doing so. He further maintained that the payment was not in connection with gambling of any nature.

The witness Jose Tantog, on rebuttal, testified that he had known the defendant since the defendant had arrested him for conducting a gambling game in his home; that he had been maintaining this game for a week prior to arrest; that he thus first met the defendant in November or December in the year 1944; that he gave the defendant \$20 on one occasion and other small sums on three or four other occasions when the defendant came to his home with other police officers in the year 1944 while he was conducting gambling games in his home. He testified that the defendant had arrested him even after he had made these payments. The witness further testified that in the latter part of the year 1944 or early 1945, he gave the defendant a twelve-foot boat after the defendant had offered to purchase it and he had refused to accept payment. [126]



The witness Catalino Prioprios, an admitted professional gambler engaged in cockfighting, on rebuttal testified that he had known the defendant since the year 1942; that the defendant had told him to run gambling games (assumedly cockfighting) and charged him \$25 each week for one year, commencing in 1943. The witness periodically made these payments directly to the defendant at the witness' home. The defendant was a lieutenant stationed at the Wahiawa police station at the time, and had arrested the witness many times (more than the witness could recount) for gambling and cockfighting during the years 1943, 1944 and 1945.

The rule firmly established in policy, tradition, and law, is that evidence, the purpose of which is to prove that a defendant on trial for one crime has committed other separate and independent crimes, is inadmissible. The purpose of the rule is to forbid and prevent the conviction of an accused for one crime by the use of evidence that he has committed other crimes, wherefrom the inference may be drawn that because he had committed other crimes he was more liable to commit the crime for which he was indicted and tried.

“The fundamental principle is that evidence must be relevant to the facts in issue in the case on trial and tend to prove or disprove such facts; evidence as to collateral facts is not admissible. Accordingly, as a general rule, evidence of other acts, even of a similar nature, of the party whose own act or conduct or that of his agents and employees is in question, of other similar transactions with which he

has been connected, of a former course of dealing, of his conduct or that of his agents and employees [127] on other occasions, or of his particular conduct upon a given occasion is not competent to prove the commission of a particular act charged against him, unless the acts are connected in some special way, indicating a relevancy beyond mere similarity in certain particulars. This rule obviously excludes evidence of all collateral facts or of those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute. Thus, as a general rule, proof that the accused in a criminal case has committed another and separate offense is not competent for the purpose of proving that he is guilty of the offense with which he stands charged. \* \* \* The general rule has long been established that *res inter alios acta* are incompetent evidence. The rule is not, however, confined to transactions with which one of the parties is not connected, but includes similar transactions between the same parties." 20 Am. Jur., Evidence § 302, pp. 278-281, and cases cited in footnotes therein.

"The general rule, which is subject to exceptions \* \* \* is that on a prosecution for a particular crime, evidence which shows or tends to show that accused has committed another crime wholly independent of, and unconnected with, that for which he is on trial, even though it is a crime of the same sort, is irrelevant and inadmissible, and such evidence of an independent crime is inadmissible for the reason, among others, that it ordinarily does not

tend to establish the commission by accused of the offense charged, that accused must be tried for one offense at a time, and that, in accordance with the more extensive general rule, [128] which applies to all cases, civil or criminal, the evidence must be confined to the point in issue \* \* \*.

“Another view of the principle is that it is not competent to prove one crime by proving another, and that one accused of crime is to be convicted, if at all, by proof of the commission of that crime alone, even though he has put his character in issue. Proof that accused committed other crimes, even if they were of like nature to that charged, is not admissible to show his depravity or criminal propensities, or the resultant likelihood of his committing the offense charged; nor may such evidence be offered if it only tends to create a prejudice against accused in the minds of the jury.” 22 C. J. S., Criminal Law § 682, pp. 1084-1089, and cases cited in footnotes therein.

As in the case of any general rule, however, exceptions have been engrafted which do, in certain circumstances and for specific limited purposes, permit evidence of the commission by the accused of crimes other than the one for which he is being tried. The exceptions are numerous. Their proper application is scrupulously safeguarded. When properly applied they are conducive to justice, but should not be so extended as to destroy the rule. The exception applicable to the instant cases relates to the admissibility of the testimony in question as probative of the corrupt intent which is in issue as an essential element of the crime charged.

“Whenever mental state, guilty knowledge, or scienter is an essential element of the offense charged, evidence is admissible of acts committed by the accused and his conduct [129] at or about the time of the commission of the offense charged against him which tend to establish his knowledge or intent, his motive for the commission of the crime, the absence of mistake or accident or of a common scheme, plan, or system on his part, notwithstanding such evidence proves or tends to prove an offense other than that charged.” 20 Am. Jur., Evidence § 313, pp. 293-295, and cases cited in footnotes therein.

“As a general rule, evidence of other offenses committed or attempted by accused is admissible to show, or when it tends to show, his criminal intent or purpose with respect to the offense charged, as tending to show his guilt thereof, and proper evidence which proves or tends to prove the particular intent is not to be excluded because it incidentally discloses the commission of an independent crime by accused, or an attempt or threat to commit one. More precisely, such a rule has been applied where the other offenses are of the same or a like nature, and were committed at about the same time, or at a time not too remote, where intent is in issue or is an essential or material element of the offense charged, where the other offenses are part of the same transaction as the one charged, or are so connected or related to it as to show intent or to have some tendency to prove its commission, or are so related that the mental state involved is practically continuous



\* \* \*.” 22 C. J. S., Criminal Law § 686, pp. 1100-1105, and cases cited in footnotes therein.

The exception, *supra*, is applicable where it conforms to all the prerequisites of its admissibility in a trial where the specific crime charged is that of receiving a bribe. [130]

“In prosecutions for bribery, as in prosecutions for other offenses, the rule is that evidence which shows or tends to show that the accused has committed another crime independent of that for which he is being tried is inadmissible. The rule is merely an application of the general rule which restricts the evidence of facts relating to the point in issue and excludes evidence of collateral matters. There are several exceptions to the rule, however. In accordance with these exceptions, evidence of other crimes is admissible in prosecutions for bribery where it shows knowledge, intent, plan or system, etc., in the commission of the bribery.” 8 Am. Jur., Bribery § 32, p. 903, and cases cited in footnotes therein.

“\* \* \* but evidence of acts similar to the one relied on, intimately and directly connected with the particular accusation, is relevant, forms part of the same transaction, and is material to illustrate the knowledge and intent with which the particular act was committed, and rebut inferences of any honest intent or purpose.” 11 C. J. S., Bribery § 14 (b), pp. 869, 871.

The testimony constituting specified errors 4, 5, 7, 8 and 9 was admitted under an assertion of materiality and competency under the indictments, as



showing intent, scheme, general plan and relationship of the defendant to the particular type of crimes for which he was on trial.

That evidence of the commission by the defendant of separate and independent offenses of a kindred nature, where the intent of the accused is in issue is admissible, has been heretofore determined by this court in the following cases wherein the precise question was presented: [131]

In the case of *Ter. v. Chong Pang Yet*, 27 Haw. 693, the offense charged was the issuance of a check by the defendant without sufficient funds in the bank. The defendant admitted giving the check in question to the complaining witness, further admitting that at the time he knew he had neither funds in nor credit with the bank sufficient to honor the check when presented. The defendant testified that when he gave the check in question to the complaining witness he told him he had no funds in the bank and that he had agreed to withhold presentation of the check until a later date. This was denied by the complaining witness. The defendant denied that he had any intent to defraud the complaining witness in giving him the check. Upon cross-examination the defendant admitted that, although knowing he had insufficient funds in and no credit with the bank shortly before giving the check complained of he had given several other persons checks upon the same bank. The prosecution was thereupon allowed to question the defendant as to whether on a previous occasion he had issued a check on another bank not having sufficient funds or credit therein to

honor the check. On appeal, the defendant in error contended that the admission of the testimony upon the tender of the prior check on another bank was erroneous and prejudicial and that it had no bearing upon the issue.

This court, in determining the issue, stated:

“In the case at bar the charge against defendant is that he gave the worthless check with intent to defraud the payee. The question of fraudulent intent was directly in issue and the evidence complained of was therefore [132] relevant and admissible as tending to show that intent. As was said by the Supreme Court of the United States speaking through Mr. Justice Story in *Wood v. United States*, 16 Pet. 342, 360, ‘The question was one of fraudulent intent or not; and upon questions of that sort, where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party, of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment. Indeed, in no other way would it be practicable, in many cases, to establish such intent or motive, for the single act, taken by itself, may not be decisive either way; but when taken in connection with others of the like character and nature, the intent and motive may be demonstrated almost with a conclusive certainty.’ ” *Ter. v. Chong Pang Yet*, *supra*, at pp. 695, 696.

In the case of *Ter. v. Awana*, 28 Haw. 546, the defendant was convicted of the crime of embezzle-

ment. One of the assigned errors was that evidence of similar offenses was improperly admitted for the reason that intent was not a necessary ingredient of the offense charged in the indictment, and that the evidence did not show, beyond a reasonable doubt, that the defendant was guilty of the other similar separate independent offenses.

The indictment charged embezzlement of a single specific sum which, under the theory of the prosecution, was received by the defendant in the course of his official duties as a clerk in the Honolulu Water Works. At the trial [133] other checks, ledger cards, stubs and receipts, evidencing payments by other water consumers to the Honolulu Water Works and embezzled by the defendant prior to the embezzlement charged in the indictment, were admitted in evidence.

This court, in affirming the application of the exception to the rule now before us that the evidence of similar offenses was admissible, stated:

“Evidence of other crimes similar to that charged is relevant and admissible when it shows or tends to show a particular criminal intent which is necessary to constitute the crime charged. That this evidence incidentally proves independent crimes is immaterial. (\* \* \* *Territory v. Chong Pang Yet*, 27 Haw. 693, 695.) Where a fraudulent intent is an essential ingredient of the crime of embezzlement the rule admitting evidence of other crimes similar to that charged tending to show a fraudulent intent is peculiarly applicable.” *Ter. v. Awana*, *supra*, pp. 547, 548.

In further findings that the evidence of guilt of the defendant of the separate independent offenses need not be established beyond a reasonable doubt, this court said:

“We prefer the reasoning and the rule enunciated in *Commonwealth v. Robinson*, 16 N. E. (Mass.) 452, approved and followed in *State v. Hyde*, 136 S. W. (Mo.) 316, to the effect that the evidence of other crimes similar to that charged need only tend to prove the defendant guilty of such other crimes. The degree of proof required of the prosecution to entitle it to a conviction applies to the offense charged and every essential ingredient thereof. One of the [134] essential ingredients of the embezzlement as charged was a fraudulent intent. Hence the fraudulent intent must be proved beyond all reasonable doubt. It does not follow that a collateral matter from which intent may be inferred must also be proved beyond all reasonable doubt. To require such a degree of certainty would be unreasonable and cast a burden upon the prosecution in excess of what the protection of persons accused of crime requires.” *Ter. v. Awana*, *supra*, p. 550.

We are of the opinion that the rule established in the *Awana* case is directly applicable to the instant appeals. The indictments are framed in the language of section 11071 of Revised Laws of Hawaii, 1945, and allege in part: “\* \* \* the said Clarence C. Caminos, under color of his office, did, unlawfully, corruptly, wilfully and feloniously \* \* \*.” The term “corruptly,” as used in the indictments,



means an intent, motive and design by the defendant to pervert the public office and trust reposed in him as a police officer by not performing his official duties and apprehending and arresting those named in the indictments for conducting, carrying on, playing and engaging in gambling and gambling games, in violation of and prohibited by the laws of the Territory of Hawaii.

The defendant, as a witness on his own behalf, denied that he had received any moneys whatsoever constituting bribe payments. This denial, in addition to his plea of not guilty to the indictments, magnetized the question of intent directly into issue, imposing the burden of proof upon [135] the Territory. Being thus required to prove corruptness on the part of the defendant, under the decisions, *supra*, the Territory was entitled to introduce any and all evidence competent and material for that purpose.

Upon review of the testimony of the five witnesses (specifications numbered 4, 5, 7, 8 and 9), we find that their testimony of the separate, independent, kindred offenses is sufficiently related in character, time and place of commission, as to embrace them within the exception to the rule cited *supra* as competent and material evidence upon the issue of intent.

It is too well established to require citations of authorities therefor that evidence of prior, separate, independent offenses may be introduced upon rebuttal. That the testimony of three of the witnesses was introduced on rebuttal is immaterial.



The record discloses ample foundation laid during the testimony of the defendant as a witness on his own behalf, and by other witnesses on behalf of the defense, warranting the admission of the testimony of these three witnesses on rebuttal.

Upon the record we further find that substantial testimony of the commission of the separate independent offenses in question was introduced which tended to prove the defendant guilty of the commission of those offenses.

The testimony, the subject of assignment of errors numbered 20, 21, 22, 23 and 24, was competent and material and its admission was not [136] error.

Upon the record before us, we find the remaining twelve specifications relied upon to be without merit and that no error was committed by the court below in respect of any of them.

The judgments of the trial court are affirmed.

P. A. Lee, O. P. Soares, and F. Patterson (also on the briefs) for Plaintiff in Error.

A. R. Hawkins, Assistant Public Prosecutor (also on the briefs), for Defendant in Error.

/s/ S. B. KEMP,

/s/ LOUIS LE BARON,

/s/ EDWARD A. TOWSE.

[Endorsed]: Filed August 28, 1950. [137]

In the Supreme Court of the  
Territory of Hawaii

Nos. 2680 and 2681

October Term, 1949

TERRITORY OF HAWAII,

vs.

CLARENCE C. CAMINOS,  
Defendant-Plaintiff in Error.

Error to Circuit Court, First Circuit, Hon. A. M.  
Cristy, Judge

JUDGMENT ON WRITS OF ERROR

Pursuant to the opinion of the Supreme Court of  
the Territory of Hawaii, rendered and filed on  
August 28, 1950, in the above causes, the judgments  
of the trial court are affirmed.

Dated: Honolulu, T. H., September 11, 1950.

By the Court:

[Seal]     /s/ LEOTI V. KRONE,  
                 Clerk.

Approved:

             /s/ EDWARD A. TOWSE,  
                 Associate Justice.

A true copy.

[Endorsed]: Filed September 11, 1950. [139]

[Title of Supreme Court of Hawaii and Causes.]

PETITION FOR APPEAL

To: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the Territory of Hawaii:

Comes now Clarence C. Caminos, Defendant herein, and deeming himself aggrieved by the Judgment of the Supreme Court of the Territory of Hawaii made and entered on the 11th day of September, 1950, pursuant to the opinion and decision of said Court made and entered on the 28th day of August, 1950, prays that an appeal may be allowed from said Judgment to the United States Circuit Court of Appeals for the Ninth Circuit; that an order be made fixing the amount of costs bond; that a duly authenticated transcript of the record and proceedings upon which said decision and judgment were made be sent to the United States Circuit Court of Appeals for the Ninth Circuit; that a citation issue as provided [141] by law.

Dated at Honolulu, Hawaii, this 11th day of September, 1950.

CLARENCE C. CAMINOS,  
Defendant and  
Plaintiff-in-Error.

P. A. LEE,  
FRED PATTERSON, and  
O. P. SOARES,

By /s/ O. P. SOARES,  
His Attorney.

City and County of Honolulu,  
Territory of Hawaii—ss.

O. P. Soares, being first duly sworn on oath deposes and says that he is of counsel for Clarence C. Caminos, above named; that he has read the foregoing petition and knows the contents thereof and that the same is true, and that the same is filed in good faith and not for purposes of delay.

/s/ O. P. SOARES.

Subscribed and sworn to before me, this 11th day of September, 1950.

[Seal] /s/ TERRY GOMES,

Notary Public, First Judicial Circuit, Territory of Hawaii.

My commission expires: 6/30/53.

A true copy.

[Endorsed]: Filed September 15, 1950. [142]

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[Title of Supreme Court of Hawaii and Causes.]

### ASSIGNMENT OF ERRORS

Now comes Clarence C. Caminos, defendant and plaintiff-in-error above named, by his attorneys, and files the following assignment of errors upon which he will rely in the prosecution of his appeal in the above-entitled matter from the Judgment entered herein on the 11th day of September, 1950,

dismissing his writ of error and affirming the judgments of the trial court below:

Assignment of Error No. I.

That the Supreme Court of the Territory of Hawaii erred in holding that evidence of alleged separate and independent crimes of bribery and attempted bribery and not referred to in any indictment or information was admissible for that by so holding the defendant was deprived of his rights under the Constitution of the United States to a fair and impartial trial; to be informed of the nature of the charges against him; to present evidence on his behalf; and to be protected against another prosecution for the same offense. [144]

Assignment of Error No. II.

That the Supreme Court of the Territory of Hawaii erred in holding (without giving any reason for so holding) that defendant's assignment of error committed by the trial court in denying his motion for a directed verdict, was without merit, for that in so holding defendant was deprived of his rights under the Constitution of the United States to a fair and impartial trial; not to be held to answer except by indictment; and to be protected against another prosecution for the same offense.

Assignment of Error No. III.

That the Supreme Court of the Territory of Hawaii erred in holding (without giving any reason



for so holding) that the defendant's assignment of Error complaining of the prejudicial misconduct of the trial judge as a result of which defendant was denied a fair trial and deprived of the due process of law guaranteed by the Constitution of the United States and the bill of rights therein contained was without merit.

#### Assignment of Error No. IV.

That the Supreme Court of the Territory of Hawaii erred in holding (without giving any reason for so holding) that the defendant's assignments of error committed by the trial court in refusing to instruct the jury as to the law applicable to the case in certain specified respects as requested by defendant were without merit, for that in so holding defendant was deprived of his right under the Constitution of the United States to a fair and impartial trial and to the equal protection of the laws. [145]

#### Assignment of Error No. V.

That the Supreme Court of the Territory of Hawaii erred in holding (without giving any reason for so holding) that defendant's assignment of error committed by the trial court in giving the following instruction requested by the prosecution, to wit: Territory's Requested Instruction No. 8: "The court further instructs you, gentlemen of the jury, that if you find from the evidence in this case beyond a reasonable doubt that the defense set up by the defendant is a false and fabricated defense

and was purposely and intentionally invoked by the said defendant then you are instructed that such a false and fabricated defense forms the basis of a presumption against him because the law says that he who resorts to perjury to accomplish an end, this is against him and you may take such action as the basis of presumption of guilt'' was without merit, for that in so holding defendant was deprived of his right under the Constitution of the United States to a fair and impartial trial and to the due process of law.

Wherefore, Clarence C. Caminos, defendant and Plaintiff-in-Error, prays that judgment and decision of this cause be reversed and the cause remanded with instructions to discharge the defendant.

Dated at Honolulu, Hawaii, this 11th day of September, 1950.

CLARENCE C. CAMINOS,  
Defendant and  
Plaintiff-in-Error.

FRED PATTERSON,  
PETER A. LEE, and  
O. P. SOARES,

/s/ O. P. SOARES,  
His Attorneys.

A true copy.

[Endorsed]: Filed September 15, 1950. [146]

[Title of Supreme Court of Hawaii and Causes.]

### COST BOND

Know All Men by These Presents:

That Clarence C. Caminos, as principal, and Fong Hing and Leonard K. M. Fong, as sureties, are held and firmly bound unto the Territory of Hawaii in the just and full sum of Two Hundred Fifty Dollars (\$250.00), legal currency of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, firmly by these presents.

The condition of this obligation is such that:

Whereas, the above bounden principal, Clarence C. Caminos, has filed his Petition for Appeal from the Supreme Court of the Territory of Hawaii to the United States Court of Appeals for the Ninth Circuit from the judgment of said Supreme Court entered on the 11th day of September, 1950.

Now, Therefore, if said principal shall prosecute his appeal with effect and answer for all costs, if he fails to sustain said appeal, then this obligation

shall be void, [148] otherwise it remains in full force and effect.

Sealed with our seals and dated at Honolulu, Hawaii, this 14th day of September, 1950.

/s/ CLARENCE C. CAMINOS,  
Principal.

/s/ FONG HING,  
Surety.

/s/ LEONARD K. M. FONG,  
Surety.

---

### AFFIDAVIT OF SURETIES

City and County of Honolulu,  
Territory of Hawaii—ss.

Fong Hing and Leonard K. M. Fong sureties on the foregoing bond, being first duly sworn on oath, depose and say that they are residents of the City and County of Honolulu, Territory of Hawaii, and are each more than twenty years of age; that they have property situate within the Territory of Hawaii subject to execution; and that they are, each and not together, worth the sum of \$250.00 in such property situate within said Territory of Hawaii over and above all their debts and liabilities and property exempt from execution.

/s/ FONG HING.

/s/ LEONARD K. M. FONG.

Subscribed and sworn to before me this 14th day of September, 1950.

[Seal]     /s/ MANDELL F. BROOKS,

Notary Public, First Judicial Circuit, Territory of  
Hawaii.

My commission expires: July 31, 1951. [149]

The Foregoing Bond Is Hereby Approved as to  
Form, Amount and Sufficiency of Sureties.

[Seal]     /s/ LOUIS LeBARON,

Justice, Supreme Court,  
Territory of Hawaii.

A true copy.

[Endorsed]: Filed September 15, 1950. [150]

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[Title of Supreme Court of Hawaii and Causes.]

### ORDER ALLOWING APPEAL

The appeal prayed for in the above-entitled matter is hereby allowed upon the filing of a bond in the sum of \$250.00 with good and sufficient surety.

Dated at Honolulu, Hawaii, this 15th day of September, 1950.

[Seal]     /s/ LOUIS LeBARON,

Justice.

A true copy.

[Endorsed]: Filed September 15, 1950. [152]



[Title of Supreme Court of Hawaii and Causes.]

CITATION

The Territory of Hawaii,

To Plaintiff and Defendant-in-Error above named,  
and to Chas. M. Hite, Esq., Public Prosecutor  
of the City and County of Honolulu, Territory  
of Hawaii, its attorney:

You are hereby cited to appear in the United  
States Court of Appeals for the Ninth Circuit in  
the above-entitled matter within 40 days from the  
date hereof.

Dated: Honolulu, Hawaii, this 15th day of Sep-  
tember, 1950.

[Seal]      /s/ LOUIS LeBARON,  
Justice.

A true copy.

[Endorsed]: Filed September 15, 1950. [154]

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[Title of Supreme Court of Hawaii and Causes.]

NOTICE OF APPEAL

1. Clarence C. Caminos, 1383 Loko Drive, Wa-  
hiawa, City and County of Honolulu, Territory  
of Hawaii.
2. Peter A. Lee, 313 McCandless Building, Bethel  
and King Streets, Honolulu, Hawaii.  
Fred Patterson, 308 McCandless Building,  
Bethel and King Streets, Honolulu, Hawaii.  
O. P. Soares, 1-2 Union Trust Building P. O.  
Box 2702, Honolulu, Hawaii.

3. Violation of Section 11071 of the Revised Laws of Hawaii, 1945.
4. Judgment: September 11, 1950.
5. Upon verdict of a jury, defendant adjudged guilty and sentenced to imprisonment at hard labor for a maximum of ..... Years, which judgments were affirmed by the Supreme Court of the Territory of Hawaii from which latter judgment this appeal is prosecuted.
6. Defendant is on bail, the amount and the sufficiency of the sureties, being duly [156] approved.
7. The defendant has been deprived of his rights under the Constitution to a fair and impartial trial; to be protected against double jeopardy; to the due process of law; to be informed of the nature of the charges against him; to present evidence on his behalf; not to be held to answer except by indictment, and to the equal protection of the laws.

Dated at Honolulu, Hawaii, this 15th day of September, 1950.

CLARENCE CAMINOS,  
Defendant and  
Plaintiff-in-Error.

FRED PATTERSON,  
PETER A. LEE, and  
O. P. SOARES,

By /s/ O. P. SOARES,  
His Attorneys.

A true copy.

[Endorsed]: Filed September 15, 1950. [157]

[Title of Supreme Court of Hawaii and Causes.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the above-entitled Court:

You will please prepare transcript of record of this cause to be filed in the Office of the Clerk of the United States Court of Appeals for the Ninth Circuit, and include in said transcript the following pleadings and papers on file, to wit:

I. Indictments.

II. Minutes of Clerk, First Circuit Court on file in this Court.

III. Transcript of shorthand reporters notes of the following:

1. The testimony of the Territory's witness, Paul Au, beginning with the line on page 88 of said transcript which reads:

“Q. Mr. Au, at the time that Captain Caminos came on the——”

and ending with the line on page 98 of said transcript which reads:

“through Bill Clark.”

2. The testimony of the Territory's witness, William K. Clark

(a) beginning with the line on page 167 of said transcript which reads: [159]

“Q. When you first met Paul Au in January, 1945, who was the”

and ending with the line on page 169 of said transcript which reads:

“The Court: Exception allowed.”

(b) beginning with the line on page 182 of said transcript which reads:

“Mr. Lewis: You started to testify, Mr. Clark that when”

and ending with the line on page 183 reading:

“Mr. Lewis: No further questions.”

(c) beginning with the line on page 173 of said transcript which reads:

“Q. What did you do with your money, Mr. Clark.”

and ending with the line on page 174 of said transcript which reads:

“thousand in bonds.”

(d) beginning with the line on page 187 of said transcript which reads:

“Q. That makes your ‘take’ for that year \$39,000.00 from”

and ending with the line on page 189 of said transcript which reads:

“A. That’s right.”

(e) beginning with the line on page 219 of said transcript which reads:

“Q, Now in connection with your payments from these other”

and ending with the line on page 221 of said transcript which reads:

“envelope, it was just dished out to me that way.”

3. The testimony of the Territory’s witness, Thomas G. Rodenhurst:

beginning with the line on page 229 of said transcript which reads:

“Q. During the month of November, 1945, did you see the”

and ending with the line on page 232 of said transcript which reads:

“Mr. Lewis: No further questions.” [160]

4. The testimony of the Territory’s witness, Lawrence Fat Loo:

beginning with the line on page 249 of said transcript which reads:

“Mr. Lewis: Mr. Loo, how did you make a livelihood?”

and ending with the line on page 254 of said transcript which reads:

“Mr. Lewis: No further cross-examination.”

5. The testimony of the Territory’s witness, Richard Kazuo Mikami:

beginning with the line on page 774 of said transcript which reads:

“Q. Mr. Mikami, in the latter part of 1945, in late November,”

and ending with the line on page 809 of said transcript which reads:

“The Court: Motion is denied.”

6. The testimony of Territory’s witness, Jose Tantog:

beginning with the line on page 818 of said transcript which reads:



“Jose Tantog”

and ending with the line on page 825 of said transcript which reads:

“Mr. Lewis: No further questions.”

7. The testimony of Territory’s witness, Catalino Priopios:

beginning with the line on page 839 of said transcript which reads:

“Q. What you do for living then, 1945?”

and ending with the line on page 843 of said transcript which reads:

“Mr. Young: No further questions.”

8. The exchanges between Court and counsel appearing on the following pages of said transcript and there indicated by being inclosed in brackets, to wit:

pp. 73, 102 and 103, 115, 140, 245 and 246, 337 to 339 (inclusive), 362 and 363, 528 and 529, 813 and 814, 830. [161]

IV. Minutes of the Clerk of the Supreme Court of the Territory of Hawaii.

V. Opinion and decision of the Supreme Court of the Territory of Hawaii.

VI. Judgment of the Supreme Court of the Territory of Hawaii.

VII. Petition for Appeal.

VIII. Assignment of Errors.

IX. Cost Bond.

X. Order Allowing Appeal.

XI. Citation.

XII. Notice of Appeal.

XIII. This praecipe.

Said transcript to be prepared as required by law, and the rules of this Court, and the rules of the United States Court of Appeals for the Ninth Circuit, and filed in the Office of the Clerk of said Court of Appeals, at San Francisco, in the State of California.

Dated at Honolulu, Hawaii, this 25th day of October, 1950.

CLARENCE C. CAMINOS,  
Defendant and  
Plaintiff-in-Error.

FRED PATTERSON,  
PETER A. LEE and  
O. P. SOARES.

O. P. SOARES,  
His attorneys.

A true copy.

[Endorsed]: Filed October 25, 1950.

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[Title of Supreme Court of Hawaii and Causes.]

## ORDER EXTENDING TIME FOR RECORD

Good cause appearing therefor,

The time during which the Defendant and Plaintiff-in-Error may file the records in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit is hereby extended to include the 14th day of December, 1950.

Dated at Honolulu, Hawaii, this 25th day of October, 1950.

[Seal]      /s/ EDWARD A. TOWSE,  
Justice.

A true copy.

[Endorsed]: Filed October 25, 1950.

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[Title of Supreme Court of Hawaii and Causes.]

### SUPREME COURT CLERK'S CERTIFICATE

I, Leoti V. Krone, clerk of the Supreme Court of the Territory of Hawaii, do hereby certify that the foregoing documents listed in the index hereto attached are full, true and correct copies of the certified copies and of the originals on file in the above-entitled court and cause. I further certify that the excerpts of testimony of the proceedings had in the trial of said cause in the court below are true and correct copies of the original transcript of proceedings filed in the above court and cause. I further certify that all documents and items listed in said index are attached hereto.

I further certify that the cost of the foregoing transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit is \$252.99, and that the said amount has been paid by the attorneys for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the supreme court of

the Territory of Hawaii, at Honolulu, this 8th day of December, 1950.

[Seal]            /s/ LEOTI V. KRONE,  
Clerk.

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[Endorsed]: No. 12769. United States Court of Appeals for the Ninth Circuit. Clarence C. Caminos, Appellant, vs. Territory of Hawaii, Appellee. Transcript of Record. Appeal from the Supreme Court of the Territory of Hawaii.

Filed December 13, 1950.

                  /s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

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(Error to Circuit Court, First Circuit, Territory of Hawaii, Hon. A. M. Cristy, Judge, Cr. Nos. 19015 and 19018, Appeal from Supreme Court, Territory of Hawaii, Nos. 2680 and 2681.)

#### STATEMENT OF POINTS AND DESIGNA- TION OF PARTS OF RECORD

Comes now Clarence C. Caminos, Appellant herein, by and through his attorneys, Fred Patterson, Peter A. Lee, and O. P. Soares, and in compliance with Subdivision 6 of Rule 19 requiring a concise statement of the points on which Appellant intends to rely on the appeal, hereby adopts as the points on appeal the assignment of errors appearing in the transcript of the record, and in compliance with the

rules of this Court pertaining to designation of the portion of the record to be printed, directs that the entire record on appeal as set forth in the Praeceptum heretofore filed with the Clerk of the Supreme Court of the Territory of Hawaii with the request that copies of the record as so designated be prepared and transmitted to this Court, be printed as the record on review.

Dated at Honolulu, Hawaii, this 11th day of December, 1950.

FRED PATTERSON,  
PETER A. LEE and  
O. P. SOARES,

Attorneys for Appellant,  
(Plaintiff-in-Error)

By /s/ O. P. SOARES.

Service admitted.

[Endorsed]: Filed December 13, 1950.



No. 12,769

IN THE

United States Court of Appeals  
For the Ninth Circuit

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CLARENCE C. CAMINOS,

vs.

TERRITORY OF HAWAII,

*Appellant,*

*Appellee.*

On Appeal from the Supreme Court of the  
Territory of Hawaii.

BRIEF FOR APPELLANT.

---

FRED PATTERSON,

308 McCandless Building, Honolulu, Hawaii,

PETER A. LEE,

313 McCandless Building, Honolulu, Hawaii,

O. P. SOARES,

1-2 Union Trust Building, Honolulu, Hawaii,

*Attorneys for Appellant.*

FILED

MAR 30 1950



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The Supreme Court of the Territory of Hawaii erred in holding (without giving any reason for so holding) that defendant's assignment of error committed by the trial court in denying his motion for a directed verdict, was without merit, for that in so holding defendant was deprived of his rights under the Constitution of the United States to a fair and impartial trial; not to be held to answer except by indictment; and to be protected against another prosecution for the same offense.....	39
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The Supreme Court of the Territory of Hawaii erred in holding (without giving any reason for so holding) that the defendant's assignment of error complaining of the prejudicial misconduct of the trial judge as a result of which defendant was denied a fair trial and deprived of the due process of law guaranteed by the Constitution of the United States and the Bill of Rights therein contained was without merit .....	40
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No. 12,769

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

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CLARENCE C. CAMINOS,

vs.

TERRITORY OF HAWAII,

*Appellant,*

*Appellee.*

On Appeal from the Supreme Court of the  
Territory of Hawaii.

**BRIEF FOR APPELLANT.**

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**STATEMENT OF JURISDICTION.**

By two indictments returned by a grand jury of the Territory of Hawaii defendant was charged with accepting bribes while a police officer of the police department of the City and County of Honolulu in violation of Section 10791 of the Revised Laws of Hawaii 1945. (T. 3-12.) The indictments were consolidated for trial. (T. 17.) After trial by jury and conviction, defendant was adjudged guilty on all counts of both indictments whereupon he perfected his appeal to the Supreme Court of the Territory of Hawaii. By decision (T. 157-175) and judgment of

that court (T. 176) the judgments of the trial court were affirmed on the 11th day of September, 1950. On the 15th day of September, 1950, defendant filed a petition for appeal to the United States Court of Appeals of the Ninth Circuit (T. 177) and on the same day the appeal prayed for was allowed. (T. 184.) In accordance with the order allowing appeal, an approved bond was given (T. 182), notice of appeal was filed. (T. 185.) An assignment of errors was likewise filed (T. 178) alleging error by the Supreme Court of the Territory of Hawaii, which error it is alleged resulted in the defendant's being deprived of his rights under the Constitution.

It is believed that the United States Court of Appeals for the Ninth Circuit has jurisdiction to review the judgment of the Supreme Court of the Territory of Hawaii (T. 176) by reason of the provisions of Section 128 of the Judicial Code,

The circuit courts of appeals shall have appellate jurisdiction to review by appeal or writ of error final decisions—

First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under Section 345 of this title.

Second. In the United States district courts for Hawaii and for Porto Rico in all cases.

Third. In the district courts for Alaska, or any division thereof, and for the Virgin Islands, in all cases, civil and criminal, wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is

involved; in all other civil cases wherein the value in controversy, exclusive of interest and costs, exceeds \$1,000; in all other criminal cases where the offense charged is punishable by imprisonment for a term exceeding one year or by death, and in all habeas corpus proceedings; and in the district court for the Canal Zone in the cases and mode prescribed in sections 1307, 1324, 1336, and 1341 to 1356 of Title 48.

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### STATEMENT OF THE CASE.

Each indictment charged defendant with receiving bribes in violation of Section 11071 of the Revised Laws of Hawaii 1945. In material part the section reads:

“Every executive \* \* \* officer \* \* \* who corruptly accepts any gift, gratuity, beneficial service, or act or promise of either, under an agreement or with an understanding that he shall in the exercise of any function in his capacity as aforesaid \* \* \* decide or act in any particular manner in any cause, question, proceeding or matter pending or that may by law come or be brought before him, shall be punished by imprisonment at hard labor not more than five years, or by fine not exceeding one thousand dollars.”

The first of the two indictments contained five counts, each charging that on or about a specified date and while he was a police officer of the City and County of Honolulu, defendant corruptly received a specified sum of money from one Paul Au in said



city and county with the agreement or understanding that he would not, in the exercise of his function and capacity as such police officer, arrest and prosecute and give evidence against Paul Au for and on account of the operation by Paul Au of a gambling game in said city and county. These counts covered a period from August 18, 1945 to September 16, 1945. The other indictment contained two similar counts—one charging violation of the section on January 6, 1946, and the other on January 13, 1946.

At the time of the alleged violations of the section, defendant was a police officer in the Honolulu Police Department and head of the vice squad. He joined the department December 4, 1928, became head of the vice squad May 19, 1945, and was removed March 30, 1946. His predecessor was a Captain Hitchcock. A function of the vice squad was to suppress gambling in Honolulu. Normally, the gambling detail of the vice squad consisted of a sergeant and three or four subordinates. Under defendant, the sergeant was William Clark, and some of the subordinates were officers Fujiyama, Ho, Kingsley, Moses, Murray, Nishida, and Peresa.

Clark joined the department in 1926. He served intermittently on the vice squad from 1932 to 1944. From November 1944 until his removal on March 30, 1946, he served continuously on the gambling detail. He was the prosecution's key witness at the trial. Testifying under promise of immunity and a further promise that he would receive a police officer's retirement pay, Clark confessed that he had used his posi-



tion as a police officer to amass over \$136,000 from bribes received from Chinese gamblers to protect their operations and from other corrupt practices.

One of the Chinese gamblers from whom Clark confessed receiving bribes was Paul Au. In the vernacular of Clark, a bribe was a "payoff": in the vernacular of Au, a "dong dong". Au was a convicted felon with a long criminal record. He owned a building on Beretania Street opposite Hall Street in Honolulu. Prior to October 1944 he operated a house of prostitution on the premises, charging each of the 10 to 20 inmates \$75 a day for plying her trade. But in October 1944 he opened up a gambling house on the second floor of the building under the name of Honolulu Rooms. The jury visited the premises during the course of the trial and an elaborate description thereof by the trial judge appears in the transcript on appeal from the circuit court to the Territorial Supreme Court. It is enough to say here that entrance thereto was from Beretania Street through a store on the ground floor and that from a hallway back of the store a stairway ascended to the gambling games on the second floor. Au also provided barred and barricaded doors, peepholes, lookouts, and emergency exits to resist and repel police raids or unwanted visitors and to facilitate dispersing the gamblers in the event of raids. Au added a further precaution: he maintained and controlled an array of 10 to 12 vicious dogs at what he considered strategic protective points.

Paul Au testified as a witness for the prosecution in its case in chief under promise of immunity. His testimony preceded that of Clark. On direct examination Au testified that after a temporary suspension gambling operations were resumed at the Honolulu Rooms on June 9, 1945, following a conversation with Clark. Virtually each week thereafter, so Au testified, he delivered two envelopes to Clark containing the "dong dong", or "payoff", or bribe money for protection—one unsealed with the bribe for Clark and "his boys", usually \$900—the other sealed with the bribe for defendant, usually \$900. A similar system of envelopes was used by Au for payment of "bonuses" for Clark and defendant. Au's testimony extended to the periods specified in the indictments, and to periods not specified thereon. All the foregoing testimony by Au came in over defendant's objections and exceptions.

In the prosecution's case in chief and under promise of immunity, Clark testified on direct examination that his first contact with Au was in January 1945 when Captain Hitchcock sent him to Au and he arranged for a "payoff" to the vice squad. This testimony came in over defendant's objections and exceptions. After defendant became head of the vice squad in May 1945, so Clark testified, defendant asked Clark "what was the Paul Au payoff for protecting his game", and Clark replied \$900 weekly for the head of the squad and \$900 weekly for Clark and his men, and defendant said it was "agreeable" to him. This testimony also came in over defendant's objections

and exceptions. Weekly thereafter, according to Clark on direct examination, he received two envelopes from Au—one unsealed and containing the stipulated “payoff” or “dong dong” for Clark and his “boys”, of which the “boys” received \$100 each and Clark the balance—and the other sealed and to be delivered to defendant. And, still according to Clark on direct examination, the same system of unsealed and sealed envelopes was followed in connection with a “bonus” to Clark and defendant based on the profits of a “banking game” subsequently conducted by Au at the Honolulu Rooms. Clark also testified that on one occasion, the date not being stated, he opened one of the sealed envelopes he was delivering to defendant and substituted bills of smaller denomination for bills he found therein.

In the course of his direct examination Clark testified that he put the bribes he received from Au in a vault at the Bishop National Bank and had thereby accumulated \$128,000 in cash and a “few thousand in bonds”. Under cross-examination, however, it developed that his bribes from Au did not exceed \$29,000, that the accumulation began in 1942, and that the sources of the accumulation included a racket described by Clark as “packing home gamblers after blackout” and from which he often averaged \$250 a night in 1942 and 1943, and bribes received by him from certain Chinese gamblers known as Fat Loo, D. C. Chang, and Small Snake. On redirect examination the court permitted the prosecution to interrogate Clark in detail as to the bribes he received from the

Chinese gamblers above named and certain others known as Hot Dog and Big Snake, and also defendant's participation in such bribes. Defendant objected to the line of interrogation and moved to strike the testimony. The objections were overruled and the motions to strike denied.

One of the witnesses for the prosecution in its case in chief was Thomas Rodenhurst, a police officer. On direct examination Rodenhurst testified that in November 1945 in a conversation with defendant about gambling in the Pearl City district, defendant asked the witness to assist in establishing cockfighting in the district, said that he would attend to all arrangements, and told the witness "you'll get yours", and when the witness stated that he was not interested defendant remarked "only a fool dies poor". The rulings of the court admitted this testimony over defendant's objections and exceptions.

Another witness for the prosecution in its case in chief was the Chinese gambler known as Fat Loo. He was another convicted felon testifying under promise of immunity. On direct examination Fat Loo testified that he operated a gambling place in 1945 and was able to operate because he was paying Clark \$700 weekly for protection, and that he also collected bribes from other Chinese gamblers and paid them to Clark. The rulings of the court admitted the Fat Loo testimony over defendant's objections and exceptions.

When the prosecution rested, defendant moved for a directed verdict on the ground that there was a



variance between the proof and the allegations of the indictments, in that the indictments charged defendant with receiving bribes from Paul Au whereas the proof was directed to that Paul Au paid bribes to Clark and that Clark paid bribes to defendant.

In the case for the defense, eleven character witnesses testified that the reputation of defendant for truth, honesty, integrity, and veracity, was good. These witnesses, listed in the order they testified, and with their occupations and years of acquaintance with defendant were as follows: Dewey Mookini, captain, Honolulu Police Department, several years; Ernest Claes, Catholic priest, 10 years; George Kinney, district agent, Standard Oil Company, 30 years; Edward Burns, real estate broker, formerly assistant chief of police, Honolulu Police Department, 10 years; Sanford Parker, real estate and insurance broker, 10 years; William Cleghorn, ranch manager, Hawaiian Pineapple Company, 25 years; Theodore Nobriga, director of Recreation, Honolulu, formerly captain uniform patrol division, Honolulu Police Department, 7 years; William Hoopai, Chief of Police, Honolulu Police Department, formerly clerk of the circuit court, 18 years; Sydney Gatton, salesman, Honolulu Paper Company, 20 years; Lawrence Kunihiha, department store manager, 20 years; Leon Straus, captain of detectives, Honolulu Police Department, 10 years.

Five of the members of the gambling detail of the vice squad while Clark was sergeant and defendant the head, testified as witnesses for the defense. Listed in the order they testified they were: Robert Kingsley;



Louis Peresa; Theodore Murray; Ernest Moses, and Robert Nishida. Each testified that he was under indictment for bribery. Each testified that defendant as head of the vice squad had issued orders to suppress gambling in Honolulu. Each denied receiving bribes from or through Clark or any other person. Each later stood trial on the indictments, and each was acquitted.

Defendant was a witness in his own behalf. During the course of his direct examination he testified that when he became head of the vice squad he issued orders to members of the gambling detail to suppress gambling in Honolulu. He denied receiving bribes from or through Clark or any other person. He contradicted the Rodenhurst testimony. He had been promised immunity by the prosecution in exchange for information implicating Chief of Police Gabrielson, Assistant Chief of Police Hoopai, and Assistant Chief of Police Dan Liu in receiving bribes, and his reply to the offer was that he had no information of that character.

On cross-examination defendant was asked if he knew Jose Tantog of Waialua and answered that he had arrested him for gambling and had bought a discarded boat from Tantog for \$10. Defendant was also asked if he knew Vincente (Tony) Acquita of Wahiawa and answered that he had arrested him for cockfighting. When defendant was asked if he had received any money from Acquita, he answered "no". Defendant was further asked if he knew Catalino Priopios of Waimea and answered that he had ar-

rested him for cockfighting and gambling. When asked if he had received \$25 weekly from Priopios for permitting him to run gambling games defendant answered "no". And defendant was asked on cross-examination if he knew Richard Kazuo Mikami of Pearl City and answered that he had permitted Mikami and several others to use a beach cottage at Mokuleia for a week end. When asked if he had been paid \$200 or any other sum by Mikami for protection, defendant answered "no".

In its case in rebuttal, the prosecution produced Mikami, Tantog, and Priopios as witnesses. Over defendant's objections, Mikami was permitted to testify that in November 1945 he paid defendant \$200 for use of a beach cottage in 1943 or 1944; that he may have made a statement in the office of the public prosecutor on April 3, 1946, to the effect that when he paid the \$200 he told defendant he was operating a crap game; that the statement was not true; and over defendant's objections, a stenographic report of the statement of the witness on April 3, 1946, was admitted in evidence. Over the defendant's objections, Tantog was permitted to testify that he gave bribes to defendant in 1944 and also gave defendant a boat. And over defendant's objections, Priopios was permitted to testify that commencing in 1943 he paid weekly bribes of \$25 to defendant for a year.

In his case in surrebuttal, the defendant denied receiving any money from Tantog or Priopios, and restated that he had bought the boat from Tantog for \$10. Defendant's testimony that he bought the boat

for \$10 was corroborated by witness B. F. Chun, proprietor of a grocery store and meat market at Wahiawa, who had transported the boat from Waialua to Wahiawa on a small Chevrolet truck owned by the witness. With the conclusion of the Chun testimony, both sides rested.

A very important claim of defendant on his appeal is that he was deprived of a fair trial and denied the due process of law guaranteed by the Bill of Rights through prejudicial misconduct of the trial judge. This forms the basis of Assignment of Error No. III. (T. 179.)

Another claim of defendant on his appeal is that he was deprived of a fair trial and denied the due process of law guaranteed by the Bill of Rights through misdirection of the jury. This forms the basis of Assignments of Error Nos. IV and V. (T. 180.)

The jury found defendant guilty on all counts of the two indictments. A motion for new trial was made and denied. Defendant was sentenced to imprisonment for 5 years on the first count in the first indictment and fined \$1000 on each of the four other counts. Defendant was sentenced to imprisonment for 5 years on the first count of the other indictment, to run consecutively with the sentence pronounced on the first count of the first indictment, and fined \$1000 on the other count of the second indictment.

**SPECIFICATION OF ERRORS RELIED UPON.**

1. The Supreme Court of the Territory of Hawaii erred in holding that evidence of alleged separate and independent crimes of bribery and attempted bribery and not referred to in any indictment or information was admissible for that by so holding the defendant was deprived of his rights under the Constitution of the United States to a fair and impartial trial; to be informed of the nature of the charges against him; to present evidence on his behalf; and to be protected against another prosecution for the same offense. (T. 179.)

2. The Supreme Court of the Territory of Hawaii erred in holding (without giving any reason for so holding) that defendant's assignment of error committed by the trial court in denying his motion for a directed verdict, was without merit, for that in so holding defendant was deprived of his rights under the Constitution of the United States to a fair and impartial trial; not to be held to answer except by indictment; and to be protected against another prosecution for the same offense. (T. 179.)

3. The Supreme Court of the Territory of Hawaii erred in holding (without giving any reason for so holding) that the defendant's assignment of error complaining of the prejudicial misconduct of the trial judge as a result of which defendant was denied a fair trial and deprived of the due process of law guaranteed by the Constitution of the United States and the Bill of Rights therein contained was without merit. (T. 179.)



4. The Supreme Court of the Territory of Hawaii erred in holding (without giving any reason for so holding) that the defendant's assignments of error committed by the trial court in refusing to instruct the jury as to the law applicable to the case in certain specified respects as requested by defendant were without merit, for that in so holding defendant was deprived of his right under the Constitution of the United States to a fair and impartial trial and to the equal protection of the laws. (T. 180.)

5. The Supreme Court of the Territory of Hawaii erred in holding (without giving any reason for so holding) that defendant's assignment of error committed by the trial court in giving the following instruction requested by the prosecution, to-wit: Territory's Requested Instruction No. 8: "The court further instructs you, gentlemen of the jury, that if you find from the evidence in this case beyond a reasonable doubt that the defense set up by the defendant is a false and fabricated defense and was purposely and intentionally invoked by the said defendant then you are instructed that such a false and fabricated defense forms the basis of a presumption against him because the law says that he who resorts to perjury to accomplish an end, this is against him and you may take such action as the basis of presumption of guilt" was without merit, for that in so holding defendant was deprived of his right under the Constitution of the United States to a fair and impartial trial and to the due process of law.



## ARGUMENT OF THE CASE.

### SPECIFICATION OF ERROR NO. 1.

THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN HOLDING THAT EVIDENCE OF ALLEGED SEPARATE AND INDEPENDENT CRIMES OF BRIBERY AND ATTEMPTED BRIBERY AND NOT REFERRED TO IN ANY INDICTMENT OR INFORMATION WAS ADMISSIBLE FOR THAT BY SO HOLDING THE DEFENDANT WAS DEPRIVED OF HIS RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES TO A FAIR AND IMPARTIAL TRIAL; TO BE INFORMED OF THE NATURE OF THE CHARGES AGAINST HIM; TO PRESENT EVIDENCE ON HIS BEHALF; AND TO BE PROTECTED AGAINST ANOTHER PROSECUTION FOR THE SAME OFFENSE (T. p. 179).

In the course of his direct examination Clark testified that he put the bribes he received from Au in a vault at the Bishop National Bank and had thereby accumulated \$128,000 in cash and a "few thousand in bonds". (T. 78.) Under cross-examination, however, it developed that his bribes from Au did not exceed \$39,000.00, and that the sources of the accumulation included bribes received by him from certain Chinese gamblers known as Fat Loo, D. C. Chang, and Small Snake. (T. 78-80.) On redirect examination the court permitted the prosecution to interrogate Clark in detail as to the bribes he received from the Chinese gamblers above named and certain others known as Hot Dog and Big Snake, *and also defendant's participation in such bribes.* (T. 80-83.)

The trial court should have excluded the testimony and the Supreme Court of Hawaii should have ordered a new trial, not only because its admission violated the elementary rule of evidence—so elementary as to need no citation of authority in support—

that redirect examination must be confined to matters covered by the cross-examination.

Its admission violated the due process of law guaranteed the defendant by the Bill of Rights. By the injection of the testimony into the case the prosecution was permitted in its case in chief to introduce evidence tending to establish bad character of the accused. That is never permissible. (*Greer v. United States*, 245 U.S. 559, 38 S.Ct. 209, 210, 62 L.Ed. 469; 20 American Jurisprudence 304-305, sec. 325; 1 Wigmore on Evidence 456, sec. 57.)

In *Greer v. United States*, 245 U.S. 559, 38 S.Ct. 209, 210, 62 L.Ed. 469, the problem was whether the accused was entitled to an instruction that he was presumed to be of good character. In solving the problem Mr. Justice Holmes said:

“Obviously the character of the defendant was a matter of fact which, if investigated, might turn out either way. It is not established as a matter of law that all persons indicted are men of good character. If it were a fact regarded as necessarily material to the main issues it would be itself issuable, and the Government would be entitled to put in evidence whether the prisoner did or did not. As the Government cannot put in evidence except to answer evidence introduced by the defense the natural inference is that the prisoner is allowed to try to prove a good character for what it may be worth but that the choice whether to raise that issue rests with him.”

In 20 American Jurisprudence 304-305, sec. 325, the rule is stated as follows:

“It is generally recognized that the state cannot, in a criminal prosecution, introduce evidence establishing the character of the accused, unless the accused first puts his good character in issue by introducing evidence to sustain his good character or reputation, or has become a witness in his own behalf. The character of a person accused of crime is not a fact in issue in a prosecution for such crime, and the state cannot, in its evidence in chief, for the purpose of inducing belief in the defendant’s guilt, introduce evidence tending to show his bad character or that he has a tendency or disposition to commit the crime with which he is charged. It is clear that because an accused person may have a bad character it does not necessarily follow that he is guilty of the particular offense charged.”

And in 1 Wigmore on Evidence 456, sec. 57, the rule is thus stated:

“The rule, then, firmly and universally established in policy and tradition, is that the prosecution may not initially attack the defendants’ character.”

But above all, the testimony should have been excluded because its admission violated the general rule that on the trial of a person accused of crime proof of other distinct and independent crimes or offenses is not admissible. (*Boyd v. United States*, 142 U.S. 450, 456-458, 12 S.Ct. 292, 35 L.Ed. 1077; *Tedesco v. United States*, 9 Cir. 1941, 118 F. (2d) 737, 739; *Gianotos v. United States*, 9 Cir. 1939, 104 F. (2d) 929, 932; *Territory v. Chong Pang Yet*, 27 Haw. 693, 695.)



The indictments did not charge defendant with receiving bribes from Clark or from any of the Chinese gamblers Clark named in the line of testimony under discussion. Unless admission of the testimony can be justified under an exception to the general rule, it must inevitably follow that admission of the testimony was prejudicial error.

An exception to the general rule is "is that, where it is necessary to show a particular criminal intent as constituting an ingredient factor of the offense charged, evidence of other offenses similar to that charged is admissible." (*Territory v. Chong Pang Yet*, 27 Haw. 693, 695; *Territory v. Awana*, 28 Haw. 546, 547-548.) But that exception can have no application here. Intent was not an issue at the trial. Either defendant asked for and took the money from Paul Au, and was guilty, or he did neither, and was innocent. The cases of *Crinnian v. United States*, 6 Cir. 1924, 1 F. (2d) 643, and *Kempe v. United States*, 8 Cir. 1945, 151 F. (2d) 680, are directly in point.

In *Crinnian v. United States*, 1 F. (2d) 643, followed in *Harvey v. United States*, 2 Cir. 1928, 23 F. (2d) 561, 563-564, the defendant was charged with receiving certain bribes. At the trial the prosecution was permitted to introduce evidence showing that defendant had received other and similar bribes. This was held reversible error, the court saying at page 645:

"It is quite conceivable that former conduct of a prohibition agent which involved a violation of the Prohibition Act might be closely enough

connected, in time or in substance, to be relevant where the intent was controlling. Such a case might appear where an established fact permitted ambiguity as to intent, or where the taking of money by a prohibition agent might be enticing or might be detecting. There is no such issue here. Either Crinnian asked for and took the money, and is guilty, or he did neither, and is innocent. The relative credibility of Crinnian and Stinson (the bribe giver) was the issue. Proof that Crinnian had formerly violated the Prohibition Act could have no bearing on the issue, except by showing that he had the 'criminal mind' and this is the very inference that the common law calls irrelevant."

And in *Kempe v. United States*, 151 F. (2d) 680, the defendant was charged with making certain sales of gasoline in violation of price control laws. At the trial the prosecution was permitted to introduce evidence showing that defendant had made other and similar sales. This was held reversible error, the court saying at pages 687 to 690:

(687) "The general rule is that in a criminal prosecution proof which shows or tends to show that the accused is guilty of the commission of other crimes and offenses at other times, even though they are of the same nature as the one charged in the indictment, is incompetent and inadmissible for the purpose of showing the commission of the particular offense charged in the information. It is not competent to prove that the accused committed other crimes of a like nature for the purpose of showing that he would be likely to commit the crime charged in the infor-



mation. Evidence of other crimes compels a defendant to meet charges of which the information or indictment gives no information, confuses him in his defense and raises a variety of false issues. Thus the attention of the jury is diverted from the charge contained in the indictment or information. \* \* \*

(688) In 1 Wharton's Criminal Evidence, 11th ed., sec. 360, pp. 567, 568, it is said: 'Certain conditions must always exist as a predicate to the admission of evidence of other crimes. Such evidence, being a departure from the general rule of exclusion, is only admitted to render more certain the ascertainment of the exact truth as to the charge under trial. In any loose relaxation of the rule the danger to the accused (689) is that evidence may be adduced of offenses that he has not yet been called upon to defend, of which, if fairly tried, he might be able to acquit himself.' 'In the first place, the collateral offense for which an accused has not been tried tends to prove his inclination towards crime, that is to render more probable his guilt of the charge under trial, which is an absolute violation of the rule. It does not reflect in any degree upon the intelligence, integrity, or the honesty of the purpose of the juror that matters of a prejudicial character find a permanent lodgment on his mind, which will inadvertently and unconsciously enter into and affect his verdict. The juror does not possess that trained and disciplined mind which enables him either closely or judicially to discriminate between that which he is permitted to consider and that which he is not. Because of this lack of training, he is unable to draw con-

clusions entirely uninfluenced by the irrelevant prejudicial matter within his knowledge.' \* \* \*

The language used by this court in *Grantello v. United States*, 8 Cir., 3 F. (2d) 117, 119, is peculiarly applicable to the facts in this case. There the court said: 'The defendant had demurred to each count of the indictment on the ground that it was insufficient, and did not set out the facts and circumstances of the offense, so as to apprise him with what he was charged, or to enable him to prepare his defense, and those demurrers were overruled. He presented to the court below a petition for a bill of particulars and that petition was denied. He was not charged in the indictment with any of the sales, possessions, or offenses about which Gunderson and Prewitt testified, nor was he on trial for any thereof. They were in no way connected with any of the offenses charged in the indictment, and no question of the intent of the defendant was material or in issue in this case. It is neither competent, fair, nor just to a defendant to receive evidence against him of like offenses to those charged in the indictment under which he is on trial where no question of his intent is in issue and no connection between such offenses and those charged is proved. (cases cited.) Had the government desired to introduce testimony of sales it claimed that the defendant made on dates prior to the sales alleged in the information, it would have been nothing more than fair to have legally and formally charged the defendant with the making of such sales. He would have thus been apprised of the charge against him and possibly been prepared to introduce testimony to refute the truth of the charge. Instead of fol-

lowing such procedure the government sought to and did prove by leading questions over the objections of the defendant the other independent sales made prior to the dates charged in the information. When the gasoline was delivered and the ration coupons paid for it, the offenses were complete and at an end. (690) The general rule is the outgrowth of the long and sane experience, study and wisdom of jurists and of our common-law jurisprudence. An accused, whether guilty or not, is entitled to a fair and impartial trial of the charge against him. He may be a bad man generally and may have committed other crimes for which he has not been punished, but justice forbids his conviction except of the offense of which he is charged. The exceptions to the rule are well established and when properly applied are conducive to justice but should not be so extended as to destroy the rule. The incompetent evidence was prejudicial to the rights of the defendant and demands a reversal of the judgment of conviction."

For the reasons pointed out, the defendant's Constitutional rights were violated by permitting the witnesses Rodenhurst, Lawrence Fat Loo, Mikami, Tantog, and Priopios to testify.

Rodenhurst testified:

"Q. During the month of November, 1945, did you see the defendant Clarence Caminos?

A. I did.

Q. Did you see him at the Pearl City Police Station?

A. I did.

Q. Did you have a conversation with him?

A. I did.

Mr. Patterson. Objected to upon the ground it's irrelevant, immaterial and incompetent, not within the issues of this case.

The Court. I have no idea whether it is or not, Mr. Patterson; objection overruled.

Mr. Patterson. Save an exception.

Mr. Lewis. Will you tell us what that conversation was, Mr. Rodenhurst, describing the circumstances?

A. Mr. Caminos came to my office one day to talk to me about gambling activities in my district; he said in part that he had——

Mr. Patterson (interrupting). Now just a minute; I object to any testimony of this witness about any gambling activities in that district covering the year 1945; it's an entirely separate matter, has nothing to do with this particular issue at all, it's not binding on this defendant; we have no opportunity to meet it, it's conversation that took place about something in another district altogether, and it is not in corroboration and it is no part of the evidence in this case, and it tends to establish a separate and distinct transaction which is not in issue here in any way whatsoever.

The Court. Objection overruled.

Mr. Patterson. Save an exception.

The Court. Exception allowed.

Mr. Lewis. Will you continue?

A. He talked to me about gambling activities in my district with reference to cockfights; he wanted me to assist him in permitting the games to be held——

Mr. Patterson (interrupting). May our objection run to all this line of testimony, if Your Honor pleases?



The Court. Yes.

A. He wanted me to assist him in permitting the game to be run in the district of Ewa; he said that he'd like to establish these cockfights, particularly down at the Ewa Beach Lots section, and that he would attend to all the particulars and make all the arrangements. I asked him what part I would play in it, and he said, 'Let them play', and, he said, 'You'll get yours'; and I said, 'What do you mean by that, how much are you going to give me, is that what you mean?' He said, 'Yes.' He would not stipulate as to any amount, he just said, 'You'll get yours.' I said, 'What are your plans?' He said, 'To permit the game to run' in my district one week, the following week to go some place else, in Wahiawa, Kailua, and then down to Kaneohe another week, and then go back to Honolulu, and then revolve it around the district in that respect. I told Mr. Caminos that I was not interested in any such plan, that I'll have no part of it, that I was not interested in any such money under any circumstances, and that I refused to be a part of his plan, than if he wanted to go ahead with his own idea that's his business but I'll have no part of it and any games that are run in my district that I know about or my men know about will be raided.

Q. Did he say anything further than that?

A. Well, he told me not to be a 'damn fool,' he said, 'Only a fool dies poor'; then I said, 'Then I'm a damn fool, because I don't want any part of you and I'll die poor.'" (T. 84-86.)

Lawrence Fat Loo testified:

"Mr. Lewis. Mr. Loo, how did you make a livelihood?



A. Gambling.

Q. Did you operate a gambling place in the year 1945?

A. I did.

Q. And where was that located?

Mr. Patterson. That's objected to upon the ground it's irrelevant, immaterial and incompetent, not binding upon this defendant; should be connected up.

Mr. Lewis. If the Court please, we'll connect it up in connection with the previous testimony.

The Court. Objection overruled.

Mr. Patterson. Save an exception.

A. What was the question again?

Mr. Lewis. Where did you operate this gambling establishment?

A. On Pauahi and Maunakea.

Mr. Patterson. Talk a little louder, please, so we can hear you.

A. On Pauahi and Maunakea.

Mr. Lewis. In the City and County of Honolulu?

A. Yes.

Q. And did you operate there in the months of August and September, 1945?

A. Yes.

Q. Will you tell us how you were able to operate?

A. Well, we were paying——

Mr. Patterson (interrupting). Now I object to this testimony; you can see what is going to be—upon the ground it's irrelevant, immaterial and incompetent, not binding upon this defendant, it's hearsay, not within the issues of this case; anything that this man done is not binding upon Caminos.

The Court. You're a better mind-reader than the Court, Mr. Patterson; I'll have to overrule the objection from what the witness has said.

Mr. Patterson. It's right there; you don't have to be a mind-reader.

The Court. Your objection and exception may go to the entire line.

Mr. Lewis. May we have the question read?

(Reporter reads last question and incomplete answer.)

The Court. Speak up, Mr. Loo.

A. Yes. We are paying Sergeant Clark to——  
Juror (interrupting). I can't hear at all.

Mr. Lewis. Members of the jury can't hear you, Mr. Loo; talk up loud.

A. Well, we were paying Sergeant Clark \$700.00 a week so that we will not be raided.

Q. And how long did those payments continue?

Mr. Patterson. I ask that that answer—I didn't know he had finished; I ask that that answer be stricken upon the ground that it's irrelevant, immaterial and incompetent, it's not within the issue of this case, it's an entirely different transaction than anything that is alleged in this indictment; this man is charged with accepting bribes from Paul Au, and for this man to testify about a supposed payment, to a third person with reference to a game and a different man altogether is an entirely different crime which we'll be prepared to meet if it's ever presented, if it isn't presented at this time the defense is entitled to be informed and, Your Honor, we come in here in a great crime that's given in evidence here of the crime alleged, the crime between him and a man that he was bribing, and it's not bind-

ing upon Caminos; Your Honor, it's an entirely separate transaction; we have authorities about that if Your Honor wants to see them.

The Court. The Court is familiar with the general background; the evidence is permitted solely from the standpoint of the law allowing evidence of other like transactions to bear upon the credibility of witnesses in the specific transaction now charged, now too remote in time but of the same character; and your objection is overruled.

Mr. Patterson. We'd like to cite authorities on that, Your Honor.

The Court. I'm not wasting time now; you can do it with the appellate court; you've got your exception.

Mr. Patterson. I'm not asking about any appellate court, Your Honor; I'd like to be heard.

The Court. I have ruled; we're pau.

Mr. Patterson. I save an exception, if Your Honor pleases, to not being allowed to address the Court; I assign it as error, prejudicial to the rights of this defendant.

The Court. Your assignment is noted; the Court has ruled, and that is ended on this episode, Mr. Patterson; you'll kindly sit down.

Mr. Patterson. We save an exception, if Your Honor pleases.

Mr. Lewis. Mr. Loo, you stated that you paid to Sergeant Clark the sum of \$700.00 a week; how long did those payments continue?

A. They continued up to the week of the police investigation.

Q. Do you recall the date of that?

A. I don't remember.

Q. Do you remember what year it was in?

A. 1946.

Q. Do you remember the month or what part of the year it was in?

A. The early part.

Q. Mr. Loo, did you make collections from any other gambling house other than your own?

A. I did.

Q. What gambling houses were those?

A. One on Beretania Street.

Q. Who was the operator of that one?

A. Hong Lee.

Q. Is he also known as 'Small Snake'?

A. Yes.

Q. How much did you collect from him?

A. 700.

Mr. Patterson. Objected to upon the ground it's irrelevant, immaterial and incompetent, not within the issues of this case, the collection of money by this man from a man by the name of 'Small Snake' who was never in this case, who has never been mentioned in it, and to have this man testify about money which he paid to him, to 'Small Snake' for a certain bribe is not binding upon the defendant Caminos.

The Court. The objection is of the same character; the court has understood, Mr. Patterson, that your objection similarly stated goes to the entire line; I don't know that there's any necessity for specifically renewing it; that Court's faith and confidence in giving it to you that way has not been withdrawn; I understand it goes to the entire line of this witness, and so stated to you when you made your first objection.

Mr. Patterson. I think this question is a little different; we save an exception.



The Court. Exception allowed; and I again state that your objection and exception goes to the entire line of the evidence from this witness having to do with other offenses.

Mr. Patterson. On every possible ground that can be put forth.

The Court. Yes, that you've put forth, and if any new ones you're at liberty to state them.

Mr. Lewis. Mr. Loo, you say you collected from 'Small Snake'?

A. Yes.

Q. How much did you collect from him?

A. \$700.00 a week.

Q. During what year?

A. '45.

Q. 1945?

A. Yes.

Q. What did you do with that money that you collected from 'Small Snake'?

A. I gave that to Bill Clark.

Mr. Patterson. Speak up, Mr. Loo.

Mr. Lewis. You turned that over to Bill Clark?

A. Yes.

Mr. Lewis. No further questions." (T. 88-93.)

Mikami was introduced by the prosecution as witness in its case in rebuttal.

Defendant had been a witness in his own behalf. On cross-examination he was asked if he knew Richard Mikami and answered that he had permitted Mikami and several others to use a beach cottage at Mokuleia for a week end. On cross-examination he was also asked if he had been paid \$200 or any



other sum by Mikami for protection, and answered "no".

Over defendant's objections, Mikami was permitted to testify that in November 1945 he paid defendant \$200 for use of a beach cottage in 1943 or 1944; that he may have made a statement in the office of the Public Prosecutor on April 3, 1946, to the effect that when he paid the \$200 he told defendant he was operating a crap game; that the statement was not true; and over defendant's objections, a stenographic report of the statement of the witness on April 3, 1946, was admitted in evidence. (T. 93-131.)

The rule applicable here was stated by the Supreme Court of the Territory of Hawaii in *Territory v. Izumi*, 34 Haw. 209, as follows, at pages 212 and 213:

"The accused having elected to bring into the case a collateral issue it was clearly the right of the prosecution to refute, if it could, the defendant's testimony upon that issue. \* \* \* Wharton correctly states the rule to be that 'Testimony about which a witness is to be impeached must be material and relevant. Since the answers of a witness given upon cross-examination on any irrelevant or collateral matter are conclusive and binding on the cross-examiner, such witness may not be contradicted or impeached upon an immaterial or collateral matter or issue about which he testified on cross-examination by the party seeking to impeach him, and especially not by the admission of substantive evidence. This limitation, however, applies only to answers on cross-examination. It does not affect answers on the examination in chief. If, therefore, the irrele-

vant matter is given on direct examination the witness may be contradicted on it.' (3 Wharton's Criminal Evidence (11th ed.), sec. 1353.)"

On an application of the foregoing rule the prosecution was bound by the answers given by defendant on cross-examination respecting Mikami, and the court erred in admitting substantive evidence by Mikami on a collateral issue and carrying a suggestion that Mikami bribed defendant. Moreover, in a case where the witness should not have been permitted to testify at all in rebuttal, there can be no doubt that the error was aggravated by the rulings of the court permitting the prosecution, in protracted interrogation, to impeach the witness by his former statements detrimental to the defendant.

Like the witness Mikami, the witnesses Tantog and Priopios were called by the prosecution as part of its case in rebuttal. Their evidence is printed in the Transcript of the Record in this Court. Tantog's testimony appears on pages 132-140. Priopios' testimony appears on pages 140-143.

It is respectfully submitted that the error committed in this case in admitting evidence of other instances of purported bribery is analogous to the error committed in *Territory v. Blackman*, 32 Haw. 460. There is no difference in the legal principle involved in both. In the *Blackman* case, the prosecution was permitted to adduce evidence of alleged embezzlements other than the one charged. In this case the prosecution was permitted to adduce evi-

dence of alleged acts of bribery other than the acts charged.

Said Hawaii's Supreme Court in the *Blackman* case at page 469:

“\* \* \* The embezzlement of Aviation of Delaware Stock or its proceeds and the embezzlement of Mrs. Lillie's credit balance, which it is claimed by the Territory were committed, involved different amounts, and were committed, if at all, at different times. The subject matter of the two transactions was likewise entirely different and unrelated. One occurred on May 17 and the other on July 2. The former involved \$750 and the latter \$5,352.48, and they were each susceptible of proof wholly independently of the other. In fact, the evidence adduced by the Territory relating to the Aviation of Delaware stock was distinct from that pertaining to the dealings in Exeter Oil.

“In the leading case of *Goodhue v. The People*, 94 Ill. 37, the defendant, a county treasurer, was indicted for the crime of embezzlement of \$4,508.37. In the course of the trial evidence was given tending to prove at least three different acts of embezzlement, occurring at different times and under varying circumstances, and involving different amounts. The defendant made a motion for an election which was overruled. The court in discussing the question involved said (p. 51): ‘If two or more offences form part of one transaction, and are such in nature that a defendant may be guilty of both, the prosecution will not as a general rule be put to an election, but may proceed under one indictment for the several offences, though they

be felonies. The right of demanding an election and the limitation of the prosecution to one offence, is confined to charges which are actually distinct from each other and do not form parts of one and the same transaction. In misdemeanors the prosecution may, in the discretion of the court trying the case, be required to confine the evidence to one offence, or where evidence is given of two or more offences, may be required to elect one charge to be submitted to the jury, but in cases of felony it is the right of the accused, if he demand it, that he be not put upon trial at the same time for more than one offense, except in cases where the several offences are respectively parts of the same transaction. 1 Wharton Crim. Law, § 423; 1 Bishop Crim. Pr. 459. This doctrine is recognized by this court in *Lyons v. The People*, 68 Ill. 275, and is believed to accord with the practice in this state from its earliest days. It was therefore error, in this case, to refuse the application of the accused for the benefit of this rule.' ”

And, again, at page 473 of the *Blackman* case, the Supreme Court of Hawaii says:

“A compelling reason for requiring an election under the circumstances of this case is that it is impossible to determine from the verdict of the jury upon which transaction the defendants were found guilty. Some of the jurors may have concluded that in their dealings with the Aviation of Delaware stock in May 17 the defendants committed embezzlement and that this was the only embezzlement shown by the evidence. Others may have concluded that there was no embezzlement in that transaction but that the defendants



had fraudulently converted Mrs. Lillie's credit balance, or a portion of it, on July 2 and were thus guilty of embezzlement. Such a verdict, lacking as it well may the essential element of unanimity, does not meet with the requirements of the law regarding a trial by jury and is insufficient to support a judgment of guilty.

“In the case of *People v. Hatch*, 109 Pac. (Cal.) 1097, the defendant was indicted for embezzlement. In the course of the trial the prosecution introduced evidence tending to prove more than one embezzlement. The defendant made a motion for an election, which was overruled. In sending the case back for a new trial the court said (p. 1103): ‘If there had been but one offense of embezzlement proven by the evidence this charge would have been correct; or if the court had limited the jury in clear and explicit language to the consideration of but one of the offenses proven. But in the case at bar, under the one charge set forth in the indictment several distinct and separate fraudulent appropriations had been proven, and no election had been made as to which was the substantive offense upon which the indictment was predicated. Under this instruction, in the condition of the evidence in the record, the jury could bring in a verdict of guilty as charged, although each juror founded his verdict upon a different offense from that considered proven by every other juror in the box. Under this instruction, the several jurors could range over the evidence, at will, and pick out any one of the dozen or more offenses proven, and found his verdict thereon. No court can say from this record of



which offense proven under this indictment the jury found the defendant guilty.' ”

Our Court also quotes with approval, *Love v. State*, 107 So. (Miss.) 667, in which incest was the charge; *Vinson v. The State*, 140 Tenn. 70, in which violation of the age of consent law was the charge; *Lee v. State*, 240 Pac. 148, in which rape was the charge; *People v. Davis*, 141 N.W. 667, in which adultery was the charge; *Commonwealth v. Coyne*, 207 Mass. 21, in which selling intoxicating liquor to a minor was the charge, and cites a host of other cases.

In *Territory v. Abellana*, 38 Haw. 532, although the action of the trial court permitting evidence of distinct crimes was upheld, the Supreme Court of Hawaii made it abundantly clear that it did so only because the facts of the case brought it within the purview of exceptions (quoting the language of the Court at page 537) “to the established rule that evidence of other crimes wholly independent of that for which a defendant is on trial is inadmissible.”

The exceptions as stated in *Territory v. Abellana*, *supra*, at page 537 are:

(1) That evidence of other crimes is competent to prove the specific crime charged if it tends to establish a common scheme, plan or system embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, and

(2) When such evidence tends to aid in identifying the accused where his identity has not

been definitely connected with the offense on trial.

The Supreme Court of Hawaii in *Territory v. Abellana*, *supra*, cites with perfectly apparent approval, *Towne v. The People*, 89 Ill. App. 258, 283, as follows:

“But the general rule is salutary, and departure from it is perilous, and hence courts are reluctant to extend the exception to the rule beyond well established lines. While the decisions of different jurisdictions vary somewhat as to the application of this exception to the rule, yet they are all in substantial accord upon the proposition that unless there be some apparent logical connection between the two offenses, either by reason of both being of the *res gestae*, or both being part of one system, or the one tending to show a *scienter* in the other, the general rule governs, and the exception to it does not apply.”

The Supreme Court of Hawaii in the *Abellana* case emphasizes its agreement with the principles set out in *Towne v. People*, *supra*, by indicating that evidence of other crimes is not admissible unless “of such a correlative nature as to be considered competent proof within the issues framed under the indictment” (39 Haw. 532, 538); or, that it shows, “a common plan, scheme and system predicated in part upon the use of \* \* \* the focal operative instrumentality employed” (p. 539); or, “were of an intervening extemporaneous, impromptu nature, and were in fact collaterally conceived” (p. 539).

A further insight into the thinking of the Supreme Court on this subject may be had from a perusal of other language used by the court. For instance, on page 539 of the opinion we find this:

“\* \* \* The intervening crimes committed within the cemetery were, however, converted into the primary crimes of a preconceived evening’s undertaking of lawlessness employing the weapon and clip with four cartridges as a *modus operandi* in its development by preliminarily placing victims and potential victims in preludial fright or submission. These means, employed within a radius of two miles and within one hour each of the other, disclose a common plan, scheme and system embracing and collateral to the subsequent crimes testified to by the witness Rodrigues, thereby centralizing them within the orbit of the evening’s criminalisms.”

The decision of the Supreme Court in the instant case strongly emphasizes the propriety of the rule excluding evidence of other crimes. To the two exceptions to the rule noted by the court in *Territory v. Abellana, supra*, the court in its decision in this case adds an exception, namely, that “it is probative of the corrupt intent which is in issue as an essential element of the crime charged.”

It is respectfully submitted that evidence of other crimes cannot be admitted “*unless the acts are connected in some special way, indicating a relevancy beyond mere similarity in certain particulars.*” (Italics supplied.) The quoted language is from page 635 of the report of this case in the court below (38 Haw.

628) which in turn cites 20 Am. Jur., Evidence, sec. 302, pp. 278-281 and cases there cited.

It is respectfully submitted that the Supreme Court fell into the error here complained of in supposing that because to convict of bribery it is necessary to show a corrupt intent it is permissible to adduce evidence of similar acts in which corrupt intent is also not shown. In other words, the theory of the court seems to be that to establish a corrupt intent all that is necessary is to offer proof of unrelated crimes all requiring proof of corrupt intent but as to none of which is there evidence of corrupt intent. The defendant is charged with corruptly accepting bribes from one Au. No evidence is produced of the corrupt intent so the prosecution submits testimony of an unrelated incident of an alleged bribe, which cannot be an offense without proof of corrupt intent, and there being none, submits testimony of another unrelated incident of an alleged bribe which cannot be an offense without proof of corrupt intent, and there being none, submits testimony of another unrelated incident, and so on *ad infinitum*.



## SPECIFICATION OF ERROR NO. 2.

THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN HOLDING (WITHOUT GIVING ANY REASON FOR SO HOLDING) THAT DEFENDANT'S ASSIGNMENT OF ERROR COMMITTED BY THE TRIAL COURT IN DENYING HIS MOTION FOR A DIRECTED VERDICT, WAS WITHOUT MERIT, FOR THAT IN SO HOLDING DEFENDANT WAS DEPRIVED OF HIS RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES TO A FAIR AND IMPARTIAL TRIAL; NOT TO BE HELD TO ANSWER EXCEPT BY INDICTMENT; AND TO BE PROTECTED AGAINST ANOTHER PROSECUTION FOR THE SAME OFFENSE. (T. 179.)

When the prosecution rested, defendant moved for a directed verdict on the ground that there was a variance between the proof and the allegations of the indictments, in that the indictments charged defendant with receiving bribes from Paul Au whereas the proof was directed to showing that Paul Au paid bribes to Clark and that Clark paid bribes to defendant, and the motion was denied.

The indictments charged defendant with receiving bribes from Au on specified dates in August and September of 1945 and January of 1946. Au was permitted to testify, however, that before June 9, 1945, he had a conversation with Clark; that on the next day and about June 9, 1945, he reopened gambling at the Honolulu Rooms; and that ten days later he gave Bill Clark \$900.00 for him and his boys, and one sealed envelope with \$500.00 which he "instructed Bill Clark to give to Captain Caminos". Au testified that he gave bribes to Clark for defendant because Clark had said defendant would accept them.

The indictments alleged that defendant received bribes *from Paul Au*. They did not allege that Clark



was an instrumentality either in the paying or the receiving of the bribes. Au's testimony did not show that he paid any bribes *to defendant* or that defendant received any bribes *from Au*. What his testimony showed was that he paid bribes *to Clark* and that Clark might possibly have paid part thereof to defendant. Of course evidence that Clark received bribes *from Au* and paid part thereof *to defendant* would support a charge that defendant received bribes from Clark. (*State v. Sweenley*, 130 Minn. 450, 221 N.W. 225, 73 A.L.R. 380.) An acquittal of the charge of receiving bribes from Paul Au would not bar prosecution of defendant on a charge of receiving bribes *from Clark*. The Au testimony, therefore, was not proof corresponding to the allegations of the indictment.

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#### SPECIFICATION OF ERROR NO. 3.

THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN HOLDING (WITHOUT GIVING ANY REASON FOR SO HOLDING) THAT THE DEFENDANT'S ASSIGNMENT OF ERROR COMPLAINING OF THE PREJUDICIAL MISCONDUCT OF THE TRIAL JUDGE AS A RESULT OF WHICH DEFENDANT WAS DENIED A FAIR TRIAL AND DEPRIVED OF THE DUE PROCESS OF LAW GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES AND THE BILL OF RIGHTS THEREIN CONTAINED WAS WITHOUT MERIT.

The prejudicial misconduct of the trial judge began at an early stage of the trial and persisted throughout its entire course. It consisted in belittling, berating, deprecating, rebuking, and lecturing defendant's counsel, and accusing them of being untruthful and unfair.

Defendant's counsel were accused of taking advantage of the court, of the prosecution, and of the witnesses (T. p. 144). They were accused of not "giving the witness a chance" (T. p. 153), of deliberately misconstruing the testimony of witnesses (T. 144), of manufacturing evidence (T. 147), and, (inferentially, at least) of being untruthful (T. 146-147). They were accused of diverting the attention of the jury from the issues before them (T. 147). They were accused of deliberately violating rules of evidence (T. 152). They were accused of lack of diligence (T. 151). They were referred to as "mind readers" (T. 89), and their objections were referred to as "Instructions" to the court (T. 69, 146). Their offer to submit cases in support of a point of law met with the response, "I am not wasting time now; you can do it with the appellate court" (T. 90). Their objection to a question as leading and argumentative evoked the remark, "The only leading part and the only argumentative part is contained in your objection, Mr. Patterson" (T. 100). Their request upon prosecution counsel for a stipulation respecting a photograph produced by the prosecution resulted in the rebuke, "There is no occasion to call for an admission; you're examining the witness." (T. 150.)

The prejudice to the cause of the accused is so highly probable here from the manifest misconduct of the trial judge and the adverse courtroom atmosphere thereby engendered that an appellate court would not be justified in assuming its nonexistence. (*Berger v. United States*, 295 U.S. 78, 55 S. Ct. 629,

633, 79 L. Ed. 1314.) "It is an important rule," said the court in *Grock v. United States*, 289 F. 544, 545, "that an attorney at law appearing in open court in the trial of a case is entitled to such treatment from the court that the interests of this client may not be prejudiced. That is not a matter of indulgence, but of right." Similar misconduct of a trial judge caused a reversal of the judgment and sentence in *Lau Lee v. United States*, 9 Cir. 1933, 67 F. (2d) 156, the court saying, at page 159:

"We do not wish to be understood as holding that ordinarily an accusation by the judge in the presence of the jury that defendant's attorney is dishonest or attempting to mislead the jury can be cured by an instruction, even if the charge is wholly disavowed and withdrawn. Such a conclusion of bad motive should never be announced by a judge except in findings upon a formal charge of misconduct, and even then not in the presence of a jury trying another person for a crime. On the other hand, the court has the right to correct erroneous or misleading statements made by the attorneys with reference to the evidence and resulting prejudice to the defendant must be borne by them; but when the court goes further and not only impugns his conduct but also his motives, he has gone too far. The ultimate question in every criminal case is whether the defendant shall be deprived of his property or liberty or life, and that question should not be obscured or affected by the consideration of the motives of the defendant's attorney."

In *Starr v. United States*, 153 U.S. 614, 14 S. Ct. 919, 923-924, it was said:



“It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference and may prove controlling. *Hicks v. United States*, 150 U.S. 442, 452, 14 S. Ct. 144. The circumstances of this case apparently aroused the indignation of the learned judge in an uncommon degree; and that indignation was expressed in terms which were not consistent with due regard to the right and duty of the jury to exercise an independent judgment in the premises, or with the circumspection and caution which should characterize judicial utterance. \* \* \* Whatever special necessity for enforcing the law in all its rigor there may be in a particular quarter of the country, the rules by which, and the manner in which, the administration of justice should be conducted, are the same everywhere; and argumentative matter of this sort should not be thrown into the scales by the judicial officer who holds them.”

The attitude of the Supreme Court of Hawaii toward misconduct of a trial judge contributing to a conviction in a criminal action, and particularly where the misconduct is cumulative in character, is unmistakable. (*Territory v. Van Culin*, 36 Haw. 152.) In reversing a judgment and sentence it was there said, at pages 162 and 163:

“The essential requirements of a fair trial are simple and easily observed. Judges are as much judges for the defendant as for the Territory. They are supposed to sit fairly and impartially and to preserve impartially the legal rights of

both the Territory and the accused and not to insure victory or defeat for either side. To become a partisan for one or the other is to descend from the high position to which he, a judge, has been elevated and to assume the role of an advocate (cases cited). \* \* \* Appellee argues that because there is ample evidence to establish defendant's guilt, the deprivation of a fair trial does not constitute reversible error. We cannot agree with this contention. Even the criminal most deserving of punishment is entitled, under our system, to a fair and impartial trial. More important than any verdict or judgment are the legal principles which govern the fundamental rights of all. The duty of the court to assure to a defendant in a criminal case a fair trial by a jury is of paramount importance. Justice is achieved only if this right is upheld. In our opinion, the conduct of the trial judge was calculated to discredit the defendant's defense at the time he was attempting to present it and the requirements of a fair and impartial trial have been violated. The motion for a new trial, therefore, should have been granted."



## SPECIFICATION OF ERROR NO. 4.

THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN HOLDING (WITHOUT GIVING ANY REASON FOR SO HOLDING) THAT THE DEFENDANT'S ASSIGNMENT OF ERROR COMMITTED BY THE TRIAL COURT IN REFUSING TO INSTRUCT THE JURY AS TO THE LAW APPLICABLE TO THE CASE IN CERTAIN SPECIFIED RESPECTS AS REQUESTED BY DEFENDANT WERE WITHOUT MERIT, FOR THAT IN SO HOLDING DEFENDANT WAS DEPRIVED OF HIS RIGHT UNDER THE CONSTITUTION OF THE UNITED STATES TO A FAIR AND IMPARTIAL TRIAL AND TO THE EQUAL PROTECTION OF THE LAWS.

The trial court refused, though requested by the defendant, to give instructions to the jury in the following language:

"I instruct you that in this case the defendant has offered witnesses for the purpose of showing his good character. When he does so he puts his character in issue, and having done so the prosecution was at liberty, under the law, to bring witnesses before the Court to show that the defendant was not a man of good character."

"I instruct you that the prosecution has not produced any witnesses in this court tending to show that the defendant Caminos is not a man of good character or reputation; and the testimony of certain witnesses for the prosecution that is in conflict with the testimony of the defendant is not to be considered by you as character evidence but only for the purpose of deciding the issue in this case as to whether or not the defendant is guilty under the evidence in accordance with the instructions that have been given, and will be given, to you by this court."

"You are instructed that if you should find and believe that the prosecution failed to produce

available evidence, in weighing the evidence in this case, you are entitled to consider the failure of the prosecution to produce witnesses and such evidence in arriving at your verdict in this case as to whether or not the defendant is guilty or not guilty."

The circuit court erred to the prejudice of defendant in refusing to give the requested instruction.

The general rule is stated in 20 American Jurisprudence 305-306, sec. 326, as follows:

"Although there is some difference of opinion as to the kind of evidence by which character may be proved, the generally prevailing rule is that testimony to prove the good or bad character of a party to a civil action or of the defendant in a criminal prosecution must relate and be confined to the general reputation which such person sustains in the community or neighborhood in which he lives or has lived. Thus, evidence on behalf of the state in a criminal prosecution attacking the character of the accused for the purpose of impugning him as a defendant, where he puts his good character in issue by introducing evidence to sustain the same, must be confined to his general reputation for the particular traits involved in the offense charged. Evidence of specific acts or of conduct of a person upon particular occasions, bearing upon his character, is usually held to be inadmissible. The admission of such evidence would raise collateral issues and divert the minds of the jurors from the matter in hand. It is manifestly unfair to compel a party to defend specific acts alleged on proof of bad reputation or char-

acter, although he must be prepared to defend his general reputation. This rule is applicable to evidence in rebuttal as well as to original testimony. Thus, the state in rebutting the evidence of the defendant's good character is confined to evidence showing his general reputation as to having a bad character, and not to specific acts derogatory to his good character."

And in *Josey v. United States*, D. C. 1943, 135 F. (2d) 809, it was said, at page 811:

"The prosecution may not initially attack the defendant's character (1 Wigmore, Evidence, 456, sec. 57). After a defendant has attempted to show his good character in his own aid, however, the prosecution may, in rebuttal, offer evidence of his bad character. (1 Wigmore, Evidence, sec. 58.) While evidence of good or bad character is restricted to general reputation, and does not extend to particulars, a witness to good character may be asked, on cross-examination, whether he had heard particular and specific charges, or rumors, against an accused, of acts inconsistent with the trait of character about which the witness has testified. (3 Wigmore, Evidence, sec. 988.)"

A defendant is not presumed to be of good character. (*Greer v. United States*, 245 U.S. 559, 38 S. Ct. 209, 210, 62 L. Ed. 469.) On the defendant is the burden of proving good character. (*Gibson v. United States*, 9 Cir. 1929, 31 F. (2d) 19, 24.) This defendant assumed that his character was good by general reputation. That proof strengthened the presumption



of his innocence. (20 American Jurisprudence 303, sec. 324.) Establishment of his good character would create a presumption that he did not commit the crimes of which he was accused. (*Edington v. United States*, 164 U.S. 361, 17 S. Ct. 72, 41 L. Ed. 467.) In one of the instructions in this case the court told the jury that "good character itself may create a reasonable doubt and entitle the defendant to an acquittal, even though without such proof of good character you would convict".

To rebut the evidence of good character the prosecution was at liberty, under the law, to bring witnesses before the court to show that defendant's character was bad by general reputation. Although the court ruled otherwise, as discussed in earlier parts of this brief, the prosecution *was not* at liberty, under the law, to bring witnesses before the court to show *specific* acts derogatory to defendant's good character.

Good character was a vital factor in the defense to the charges. Defendant was therefore entitled to have the jury fully, fairly, and definitely instructed on the subject. He was entitled to have the jury properly informed of the type of evidence to which he was confined in showing good character and of the type of evidence to which the prosecution was confined in showing bad character. He was entitled to have the jury so instructed that in weighing the evidence on the subject it could follow and apply the commonplace rule that evidence is to be estimated not only by its own intrinsic weight but also accord-

ing to the evidence which it is in the power of one side to produce and of the other side to contradict.

The state of the evidence and the law on the subject clearly demanded the giving of the requested instruction and its refusal was manifest error operating to the unmistakable prejudice of the defendant.

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#### SPECIFICATION OF ERROR NO. 5.

THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN HOLDING (WITHOUT GIVING ANY REASON FOR SO HOLDING) THAT DEFENDANT'S ASSIGNMENT OF ERROR COMMITTED BY THE TRIAL COURT IN GIVING THE FOLLOWING INSTRUCTION REQUESTED BY THE PROSECUTION, TO-WIT: TERRITORY'S REQUESTED INSTRUCTION NO. 8: "THE COURT FURTHER INSTRUCTS YOU, GENTLEMEN OF THE JURY, THAT IF YOU FIND FROM THE EVIDENCE IN THIS CASE BEYOND A REASONABLE DOUBT THAT THE DEFENSE SET UP BY THE DEFENDANT IS A FALSE AND FABRICATED DEFENSE AND WAS PURPOSELY AND INTENTIONALLY INVOKED BY THE SAID DEFENDANT THEN YOU ARE INSTRUCTED THAT SUCH A FALSE AND FABRICATED DEFENSE FORMS THE BASIS OF A PRESUMPTION AGAINST HIM BECAUSE THE LAW SAYS THAT HE WHO RESORTS TO PERJURY TO ACCOMPLISH AN END, THIS IS AGAINST HIM AND YOU MAY TAKE SUCH ACTION AS THE BASIS OF PRESUMPTION OF GUILT" WAS WITHOUT MERIT, FOR THAT IN SO HOLDING DEFENDANT WAS DEPRIVED OF HIS RIGHT UNDER THE CONSTITUTION OF THE UNITED STATES TO A FAIR AND IMPARTIAL TRIAL AND TO THE DUE PROCESS OF LAW.

There is no "presumption" of guilt in criminal actions. Any "presumption" of that character would be utterly incompatible with the due process of law safeguarded by the Bill of Rights. The pervading presumption in every criminal action is the presump-



tion of innocence. That presumption accompanied the defendant as he comes into court and it abides with him at every stage of the trial. (*Gomila v. United States*, 5 Cir. 1944, 146 F. (2d) 372; *Gargotta v. United States*, 8 Cir. 1935, 77 F. (2d) 977.)

In *Gomila v. United States*, 146 F. (2d) 372, it was said at page 373:

“The statement that the presumption of innocence ‘was not intended, nor has it ever been intended, as extending an aid to one, who in fact is guilty, so that he may escape just punishment,’ is not a correct statement of the law. The presumption of innocence applies alike to the guilty and to the innocent, and the burden rests upon the Government throughout the trial to establish by proof beyond a reasonable doubt the guilt of the accused. Until guilt is established by such proof, the defendant is shielded by the presumption of innocence. The fact of guilt does not enter into the application of the rule, the extent and nature of which is to protect all persons coming before the court charged with crime until the presumption of innocence is overthrown by evidence establishing guilt beyond a reasonable doubt; and where the evidence is purely circumstantial, to the exclusion of every reasonable hypothesis of innocence.”

And in *Gargotta v. United States*, 77 F. (2d) 977, it was said, at page 981:

“The defendant is presumed to be innocent, and this presumption is a real presumption in his favor which abides with him at every stage of the trial. The burden of proof was on the government to prove his guilt beyond a reason-

able doubt. No principles of criminal law are more firmly fixed than these. They have been proclaimed by every court of record throughout the land. They go to the very basis of our liberties."

Here the effect of the challenged instruction was to tell the jury that if the defense was false the presumption of innocence was supplanted by a "presumption" of guilt. And here the effect of the challenged instruction was to invite the jury to find the defendant guilty if it found his defense false. But a false defense cannot convert a false charge into a true one. No matter how false a defense may be a defendant is still presumed to be innocent of the *charge* against him and the burden of proof still rests on the prosecution to prove the defendant guilty of the *charge* beyond a reasonable doubt.

That the giving of the instruction was prejudicial error cannot be doubted under the decision of the Supreme Court in *Bollenbach v. United States*, 326 U.S. 607, 66 S. Ct. 402, 406, 90 L. Ed. 350. There a jury had been instructed respecting a "presumption" that the defendant was a thief. This was held prejudicial error, the court saying:

"It would indeed be a long jump at guessing to be confident that the jury did not rely on the erroneous 'presumption' given them as a guide. A charge should not be misleading. \* \* \* Legal presumptions involve subtle conceptions to which not even judges always bring clear understanding. \* \* \* In view of the Government's insistence that there is abundant evidence to indicate

that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts."

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### CONCLUSION.

For the reasons herein set forth the judgment of the Supreme Court of Hawaii should be reversed.

Dated, Honolulu, Hawaii,  
March 30, 1951.

FRED PATTERSON,  
PETER A. LEE,  
O. P. SOARES,  
*Attorneys for Appellant.*

No. 12769

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IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

CLARENCE C. CAMINOS,

*Appellant,*

VS.

TERRITORY OF HAWAII,

*Appellee*

Upon Appeal from the Supreme Court of the  
Territory of Hawaii

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## TERRITORY'S ANSWERING BRIEF

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FILED

APR 19 1951

PAUL G. O'BRIEN

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Public Prosecutor  
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IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

CLARENCE C. CAMINOS,

*Appellant,*

vs.

TERRITORY OF HAWAII,

*Appellee*

SUMMARY OF ARGUMENT

I.

The Supreme Court of the Territory of Hawaii Did Not Err in Holding That Evidence of Alleged Separate and Independent Crimes of Bribery and Attempted Bribery Was Admissible.

A. EVIDENCE OF OTHER BRIBE PAYMENTS WAS INTRODUCED BY THE APPELLANT DURING THE CROSS-EXAMINATION OF WILLIAM CLARK.

The subject of similar and independent bribe payments, as disclosed by the record herein, was first introduced by appellant during the cross-examination of the prosecution's witness, William Clark. Therefore, the Territory of Hawaii was privileged to question Clark upon his redirect examination concerning such other bribe payments.

3 *Wharton's Criminal Evidence* (11th ed.) Sec. 1335, pp. 2213, 2214, 2215.



**B. EVIDENCE OF SIMILAR AND INDEPENDENT OFFENSES IS RELEVANT TO SHOW SPECIFIC INTENT.**

Under the Territorial bribery statute the prosecution was required to establish that the defendant had corruptly accepted bribe payments. The appellant contends that the introduction of evidence of other acts of accepting bribes was relevant to the issue of intent.

*Revised Laws of Hawaii 1945, Sec. 11071.*

*Tedesco v. United States* (9 C.C.A. 1941) 118 F. (2d) 737, 740.

*Fall v. United States*, 49 F. (2d) 506 (1931).

*People v. Johnston*, 43 N.W. (2d) 334, 339 (1950).

*Territory v. Chong Pang Yet*, 27 Haw. 693, 695 (1924).

*Territory v. Awana*, 28 Haw. 546, 547, 548 (1925).

**C. EVIDENCE OF SIMILAR AND INDEPENDENT OFFENSES IS RELEVANT TO SHOW A GENERAL PLAN.**

An exception to the general rule of criminal evidence which excludes evidence of other crimes, permits the use of evidence of similar and independent offenses to show a general plan, system or scheme.

*Underhill's Criminal Evidence, Sec. 187, p. 344, 4th ed. (Niblack).*

*II Wigmore on Evidence, 3rd Ed., Sec. 343, p. 247.*

*People v. Duffy*, 212 N.Y. 57, 105 N.E. 839, (L914) L.R.A. 1915 B 103, Ann. Cases, 1915 D. 176.

*State v. Sweeney*, 180 Minn. 450, 231 N.W. 225, 73 A.L.R. 380 (1930).

*Taylor v. State*, 174 Ga. 52, 162 S.E. 504, (1932).  
*Territory v. Abellana*, 38 Haw. 532 (1950).

**D. THAT THE TESTIMONY OF LOO, MIKAMI, TANITOG AND PRIOPIOS WAS PROPER REBUTTAL EVIDENCE.**

Under the rule of *Territory v. Izumi*, 34 Haw. 209, (1937), the Territory of Hawaii had the right to refute material statements made by the defendant during his direct examination. Also, the Territory was privileged to rebut collateral material which the defendant introduced on direct examination.

## II.

**The Supreme Court of the Territory of Hawaii Did Not Err in Holding That the Trial Court Properly Denied Defendant's Motion for a Directed Verdict.**

The record herein shows that no variance existed between the proof and the allegations of the two indictments.

*State v. Sweeney*, 180 Minn. 450, 231 N.W. 225.  
*Commonwealth v. Connally*, 308 Mass. 481, 33 N.E. (2d) 303 1941.

## III.

**The Supreme Court of the Territory of Hawaii Did Not Err in Holding That There Was No Prejudicial Misconduct on the Part of the Trial Judge.**

The trial of the present case was properly presided over by the trial judge according to principles specified under Territorial law.

*Revised Laws of Hawaii*, 1945, Sec. 10118.  
*23 Corpus Juris Secundum*, Sec. 989.  
*United States v. Cotter*, 60 F. (2d) 689.

## IV.

The Supreme Court of the Territory of Hawaii Did Not Err in Holding That the Defendant's Assignment of Error in Regard to Certain Instructions Was Without Merit.

The trial court in an instruction requested by the appellant, adequately charged the jury on the law applicable to character evidence.

*Terr. v. Marks*, 25 Haw. 219 (1919).

*Terr. v. Martins*, 28 Haw. 187 (1925).

*Instruction*— 25 H. 219 Key A.L. 829, 28 H. 187.

## V.

The Supreme Court of the Territory of Hawaii Did Not Err in Sustaining the Ruling of the Lower Court Overruling the Objection of the Defendant to the Giving of Certain Instruction Assigned as Error Under Specification of Error No. 5.

Authorities in various jurisdictions are uniform in sustaining the validity of such an instruction as set forth under Appellant's Specification of Error No. 5.

*Territory v. Truslow*, 27 Haw. 109 (1923).

*Territory v. Wong*, 30 Haw. 819 (1929).

*Territory v. Young*, 32 Haw. 628 (1933).

*Territory v. Abellana*, 38 Haw. 533 (1950).

*Allen v. United States*, 164 U.S. 492 (1896).

They are also in accord with the general principle of law upon which the legality of the aforementioned instruction is founded.

*Lindsey v. U.S.*, 264 Fed. 94 (1920).

*Waller v. U.S.*, 179 U.S. 810 (1910).

*Wilson v. U.S.*, 162 U.S. 613, 40 L.Ed. 1090, 16 Sup. Ct. 895 (1896).

*Commonwealth v. Spezzaro*, 250 Mass. 454, 146 N.E. 3 (1925).

*People v. Arnold*, 43 Mich. 303, 5 N.W. 385 (1880).

*Commonwealth v. Devaney*, 182 Mass. 33, 64 N.E. 402 (1902).

## ARGUMENT

### I.

The Supreme Court of the Territory of Hawaii Did Not Err in Holding That Evidence of Alleged Separate and Independent Crimes of Bribery and Attempted Bribery Was Admissible.

A. EVIDENCE OF OTHER BRIBE PAYMENTS WAS INTRODUCED BY THE APPELLANT DURING THE CROSS-EXAMINATION OF WILLIAM CLARK.

Police Sergeant William Clark, who served with appellant on the Honolulu Police Department vice squad in 1945, testified as a witness for the Territory. During Clark's cross-examination, the subject of bribe payments that had been received by Clark from sources other than Paul Au, was developed by the defense. The record reveals a portion of William Clark's cross-examination, as follows:

"Q. Were you getting money from anybody else?

A. Yes.

Q. Who else? A. Fat Loo.

Q. What place did he run? A. Fan-tan.

Q. No; what place did he run?

A. Service Hotel.

Q. And I suppose that's all? A. No.

Q. Anybody else? A. Western Rooms.

Q. Western Rooms, who is that?

A. That's Small Snake.



- Q. How much you got from Small Snake?
- A. During 1945?
- Q. Yes.
- A. Oh, I collected \$700.00 from him; I get \$250.00 and the Captain gets \$250.00, and the other \$200.00 goes to the boys, \$50.00 apiece.
- Q. So you get \$250.00 a week, your 'take'?
- A. That's right.
- Q. That give you about a thousand dollars a month?
- A. That's right.
- Q. So from Small Snake you got \$12,000.00 that year?      A. That's right.
- Q. Did you get any bonus from him?
- A. No.
- Q. Did you spend any of that \$12,000.00?
- A. No, I don't think so.
- Q. So, you add the twelve thousand to your twenty-nine thousand, you get forty-one thousand that year, that's from Paul Au and Small Snake Lee, correct?      A. Yes.
- Q. Who was the other man?      A. Fat Loo.
- Q. Was it a big outfit like Paul Au?
- A. Yes, big like Small Snake, \$700.00 a month.
- Q. So you get the same thing from Fat Loo?
- A. That's right.
- Q. And that \$12,000.00 was in the safe deposit box?      A. Yes.
- &. That gives you for that year 1945 \$53,000.00, is that right?      A. I think so.
- Q. Any other money you made that year?
- A. Yes, D. C. Chang.
- Q. Was he a big outfit?
- A. No; he give me in a package of cigarettes, \$70.00 wrapped up in a package of cigarettes;

that \$70.00 goes to each of my boys working under me, and I had only \$250.00.

Q. That \$70.00 and that \$250.00, of that total sum how much you get?

A. I get \$250.00 of that; each of the boys gets \$70.00 wrapped in cigarettes.

Q. So from D. C. Chang you get also \$12,000.00 a year, \$250.00 a week? A. That's right." (T. 78-80.)

The above cross-examination of William Clark not only revealed that he was receiving bribe payments from other gamblers besides Paul Au, it established the further fact that defendant Caminos, like Clark, was also receiving regular bribe payments from Paul Au and from other Honolulu gamblers.

The defendant's participation in weekly bribe payments from Honolulu gamblers was further developed on redirect examination of Clark as follows:

"Q. Now in connection with your payments from these other gambling establishments, you stated that you collected from D. C. Chang \$250.00 a week during the year 1945, for yourself?

A. Yes, sir.

Q. Now, how much did you get from Small Snake?

A. I collected \$700.00 from Small Snake through Fat Loo.

Q. And what did you do with that \$700.00?

A. Of that \$700.00 I gave each of the boys \$50.00, leaving \$500.00, and I told the Captain that I give him—I offered him \$300.00 and I'll take \$200, and the Captain told me

to split the difference, that he'll have \$250 and I'll have \$250.

Q. So the payment you received from Small Snake of \$700, out of that you kept \$250 and \$250 went to Captain Caminos?

A. That's right.

Q. Now, how about the payments—and what were those payments for?

A. Those payments were for the protection of that gambling game.

Q. How about Fat Loo, did he run a gambling game during 1945?

A. Yes.

Q. And how much did he pay you? (52)

A. \$700.00.

Q. And what did you do with that money?

A. \$50.00 for each of the boys that were working under me, \$250.00 went to the Captain, and I got \$250.00.

Q. Do you know a character by the name of 'Hot Dog'?

A. I do.

Q. Was he operating a gambling joint during 1945?

A. He operated it the latter part of 1945; he wasn't one of the first fellows that started.

Q. And did he make any payments?

A. Yes, he paid \$500.00 a week.

Q. What became of that money?

A. Each of the boys had \$50.00 apiece, that's \$200.00; with \$300.00 left, Captain Caminos got \$150.00 and I got \$150.00." (T. 80-82.)

We submit that when the subject matter of other bribe payments was introduced by appellant during the cross-examination of William Clark, the Territory was

privileged to explore such payments fully on Clark's redirect examination.

The scope and extent of redirect examination are matters that are within the discretion of the trial court, and there is no predication of error unless this discretion is abused.

3 *Wharton's Criminal Evidence* 11th ed. Sec. 1335, pp. 2213, 2214, 2215. Also, *Abbott's Criminal Practice*, 4th ed. Sec. 321, pp. 606, 607.

Professor Wharton states the scope of redirect examination as follows:

"The witness may be asked questions tending to clarify or modify statements brought out on cross-examination or to explain matters brought out in such cross-examination about which he had not testified on direct examination, or to rebut or avoid the effect of such new matters. But the court may, in its discretion, allow the introduction of further evidence in redirect examination, and may properly permit counsel to ask a question on redirect examination which he had omitted to ask upon the examination in chief. Indeed, the cross-examination of a witness may open the door for the admission on redirect examination of matters tending to support the case, which would not have been admissible on the case in chief."

3 *Wharton's Criminal Evidence*, (*supra*) p. 2214.

B. EVIDENCE OF SIMILAR AND INDEPENDENT OFFENSES IS RELEVANT TO SHOW SPECIFIC INTENT.

A well-recognized exception to the general rule of



criminal evidence that proof of a separate and independent offense is inadmissible, is that where the intent of the accused is a matter in issue, evidence may be introduced of other acts and doings of the accused to establish intent.

*Tedesco v. United States* (9 C.C.A. 1941) 118 F. (2d) 737, 740.

*Fall v. United States*, 49 F. (2d) 506 (1931).

*People v. Johnston*, 43 N.W. (2d) 334, 339 (1950).

*Territory v. Chong Pang Yet*, 27 Haw. 693, 695 (1924).

*Territory v. Awana*, 28 Haw. 546, 547, 548 (1925).

In *Tedesco v. United States* (*supra*), the United States Court of Appeals for the Ninth Circuit in stating the exception to the general rule, cited the case of *Wood v. United States*, 41 U.S. 342, 360, 16 Pet. 342, 360 10 L. Ed. 987, and quoted Mr. Justice Story, as follows:

“ . . . where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment.”

In *Territory v. Awana* (*supra*), the defendant was convicted of the crime of embezzlement. At the trial, evidence of similar offenses was introduced to establish criminal intent. The Hawaiian Supreme Court held that,

“Evidences of other crimes similar to that charged is relevant and admissible when it shows or tends to show a particular criminal intent which is necessary to constitute the crime charged. That this evidence incidentally proves independent crime is immaterial.”

The case of *Territory v. Chong Pang Yet*, (*supra*), concerned the crime of fraudulently drawing on a bank. During the trial, the prosecution introduced evidence of other offenses to prove criminal intent. The Territorial Supreme Court held as follows:

“It is the general rule that, on a prosecution for a particular offense, evidence which shows or tends to show that the accused has committed another offense wholly independent of that for which he is on trial, even though it is an offense of the same sort, is irrelevant and inadmissible. (16 C.J. p. 586.) There are, however, numerous exceptions to this rule, one of which is that, where it is necessary to show a particular criminal intent as constituting an ingredient factor of the offense charged, evidence of other offenses similar to that charged is admissible.”

The United States Court of Appeals for the Sixth Circuit in *Crinnian v. United States*, 1 F. (2d) 643 and the United States Court of Appeals for the Second Circuit in *Harvey v. United States*, 2 Cir. 1928, 23 F. (2d) 561 support appellant's contention concerning the application of the intent exception. The distinguishing feature of *Kempe v. United States*, 151 F. (2d) 680,

688, also cited by the appellant, was stated by the court as follows:

“The offenses of which the defendant was convicted are misdemeanors. Proof of specific criminal intent to commit such an offense is not essential, and the use of the word ‘wilful’ in sub-section 2 (a) (5) of 633, 50 U.S.C.A. Appendix, the Second War Powers Act of 1942, as amended, and in Section 925 (b), 50 U.S.C.A. Appendix, the Emergency Price Control Act of 1942, as amended, does not require proof of such specific intent on the part of a defendant charged with an offense under the Acts.”

The essential elements of the present charge, as defined in Section 11071, Revised Laws of Hawaii, 1945, are: (1) civil officer who, (2) corruptly accepts, (3) gratuity, (4) under an agreement or with an understanding that he shall in the exercise of any function in his official capacity, (5) decide and act in a particular manner in any question or matter that may by law come before him.

It is submitted that under the statute, the Territory was required to prove an intent, to-wit, that defendant corruptly accepted bribe payments to have his decisions or actions influenced in matters pending before him in his official capacity as an officer of the Honolulu Police Department.

*People v. Johnston*, 43 N. W. (2) 334, (Mich. 1950).

C. EVIDENCE OF SIMILAR AND INDEPENDENT OFFENSES IS RELEVANT TO SHOW A GENERAL PLAN.

Another well established exception to the general rule of criminal evidence which excludes evidence of other distinct and independent offenses is that evidence of other crimes is admissible to show a general plan.

*Underhill's Criminal Evidence*, Sec. 187 p. 344, 4th ed. (Niblack).

*Wigmore on Evidence*, 3rd Ed. II, Sec. 343, p. 247.

*People v. Duffy*, 212 N.Y. 57, 105 N.E. 839 (L914) L.R.A. 1915 B 103, Ann. Cases, 1915 D 176.

*State v. Sweeney*, 180 Minn. 450, 231 N.W. 225, 73 A.L.R. 380 (1930).

*Taylor v. State*, 174 Ga. 52, 162 S.E. 504, (1932).

*Territory v. Abellana*, 38 Haw. 532 (1950).

In *People v. Duffy*, (*supra*), a police sergeant was indicted and found guilty of receiving a bribe. The trial court admitted evidence of a collection of bills from gamblers who were not named in the indictment. The court stated in upholding the trial court that:

“Measured by the tests of ordinary experience and common sense, there cannot be any doubt that this evidence that the defendant was collecting bribes of certain lawbreakers in his precinct in connection with the other supplementary evidence which was produced tended to establish a systematic plan for the collection of graft, which would naturally include Roth who, at the same time, in the same quarter, and under the same circumstances was pursuing the same kind of an unlawful business. Independent of any evidence it might naturally be believed that payment of ‘hush money’

would not be enforced against only a part of known wrongdoers, but would be enforced from all similarly situated. But in this case the other evidence makes this connection quite inevitable. Defendant obtains a list of former bribe givers and announces a plan thenceforth to collect from them. The list includes the person named in the indictment and certain others. As already stated, their cases in respect of this matter are in all respects precisely similar. Thereafter it appears that he is making these collections from certain persons on the list, and the inference is surely permissible that the plan already outlined is not only in existence but in actual operation, and that it includes and foretells the collection for which defendant was indicted.

“The force and competency which reason and ordinary logic thus give to this evidence are, I think, fully sustained by the authorities.” (citing authorities).

In *State v. Sweeney*, (*supra*), a city alderman was indicted and convicted for receiving a bribe. The state submitted evidence of other briberies other than that which was charged in the indictment. The court in approving the admissibility of the above evidence stated as follows:

“We are here interested only in the last-mentioned exception. This exception rests upon system and involves a general and composite plan or scheme. Some connection between the crimes must be shown to have existed in fact and in the mind of the defendant, uniting them for the accomplishment of a common purpose before such evidence



can be received. This connection and such system was not shown in *State v. Fitchette*, 88 Minn. 145, 92 N.W. 527, upon which defendant herein places much reliance. The evidence in the *Fitchette* case did not bring it within any of the exceptions mentioned. That case was controlled by the general rule. The system was shown in this case. All these transactions were corrupt and were for the purpose of corruptly obtaining money through the abuse of a public trust. This was the common aim. Evidence of such other crimes is admissible, not to establish the other crimes, but as confirmation of the evidence tending to convict defendant of the crime for which he is on trial." (citing authorities).

In *Taylor v. State*, (*supra*), a county clerk was indicted for bribery. In holding that similar bribes were admissible, the Georgia court said:

"The court did not err in admitting this evidence. While it related to other offenses than that for which the defendant was on trial, it was relevant as tending to show intent, and system and to illustrate, the methods and conduct of the defendant in reference to the particular acts of bribery for which he was on trial. 'In bribery cases, evidence of similar offenses is frequently admitted to show intent, a plan or scheme to commit a series of crimes including the one for which accused is being tried, or the intimate and apparently confidential relations between the informer and the defendant; but evidence of other offenses which are not of a similar nature or character, and which do not tend to prove the bribery charge, is not admissible.' 16 C.J. 595."

The appellant cites the case of *Territory v. Blackman*, 32 Haw. 460 (1932) and states in his opening brief on page 31 that the legal principle involved in the instant case was also present in the Blackman case. It is submitted that *Territory v. Blackman* is clearly distinguishable on its facts from the instant case. The Blackman case involved the doctrine of election in embezzlement cases, and the reason for requiring the prosecution to elect was stated by the court as follows, at page 473:

“A compelling reason for requiring an election under the circumstances of this case is that it is impossible to determine from the verdict of the jury upon which transaction the defendants were found guilty. Some of the jurors may have concluded that in their dealings with the Aviation of Delaware stock on May 17 the defendants committed embezzlement and that this was the only embezzlement shown by the evidence. Others may have concluded that there was no embezzlement in that transaction but that the defendants had fraudulently converted Mrs. Lillie’s credit balance, or a portion of it, on July 2 and were thus guilty of embezzlement. Such a verdict, lacking as it well may the essential element of unanimity, does not meet with the requirements of the law regarding a trial by jury and is insufficient to support a judgment of guilty.”

The case of *Territory v. Abellana*, 38 Haw. 532 (1950), was decided by the Supreme Court of the Territory of Hawaii a month prior to its ruling in the instant case. We quote from the opinion of the court at page 537:

“To the established rule that evidence of other crimes wholly independent of that for which a defendant is on trial is inadmissible, are two equally well-defined exceptions: (1) That evidence of other crimes is competent to prove the specific crime charged if it tends to establish a common scheme, plan or system embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other; and (2) when such evidence tends to aid in identifying the accused where his identity has not been definitely connected with the offense on trial.

“While the rule itself is fundamental and well settled by a long line of adjudication, it is equally fundamental and well settled that in certain classes of cases collateral offenses may be shown as reflecting upon the mental processes \* \* \* of the accused \* \* \* where such collateral offenses have been executed according to a plan or method \* \* \*.”  
*Whiteman v. State*, 119 Ohio 285, 290, 164 N.E. 51, 52.

Thus, when the instant case came before the Territorial Supreme Court of Hawaii, the court had before it, the recent decision of *Territory v. Abellana* which sustained the use of other crimes to establish a common scheme.

The evidence established the fact that Appellant Caminos during his tour of duty as Captain of the Vice Squad was receiving regular weekly payments of money for the protection of gambling games in the City of Honolulu.

**D. THAT THE TESTIMONY OF LOO, MIKAMI, TANITOG AND PRIOPIOS WAS PROPER REBUTTAL EVIDENCE.**

During the trial, appellant took the stand in his own behalf and on direct examination testified that he had never received bribe payments from anyone. After defendant rested his case, the prosecutor called in rebuttal the witnesses Rodenhurst, Lawrence Fat Loo, Mikami, Tanitog and Priopios. These five witnesses testified to gambling activities which directly involved Captain Caminos. (Op. Br. 22-30).

In *Territory v. Izumi*, 34, Haw. 209, (1937) the defendant on direct examination denied having had sexual relations with "any other pupil." The prosecution in rebuttal produced a witness to refute defendant's statement. The Supreme Court of the Territory of Hawaii ruled as follows:

"The accused having elected to bring into the case a collateral issue it was clearly the right of the prosecution to refute, if it could, the defendant's testimony upon that issue. \* \* \* Wharton correctly states the rule to be that 'Testimony about which a witness is to be impeached must be material and relevant. Since the answers of a witness given upon cross-examination on any irrelevant or collateral matter are conclusive and binding on the cross-examiner, such witness may not be contradicted or impeached upon an immaterial or collateral matter or issue about which he testified on cross-examination by the party seeking to impeach him, and especially not by the admission of substantive evidence. This limitation, however, applies only to answers on cross-examination. It does not affect answers on the examina-



tion in chief. If, therefore, the irrelevant matter is given on direct examination the witness may be contradicted on it.' (3 Wharton's Criminal Evidence (11th ed.), sec. 1353.)"

It is respectfully submitted that evidence of a system of collecting bribes from certain Honolulu gamblers was introduced into the instant case by the appellant, himself, when he cross-examined the Territory's witness William Clark on the subject of pay-offs from gamblers other than Paul Au. The redirect examination of William Clark revealed that Caminos was receiving regular bribe payments from several Honolulu gamblers. The right of the Territory to re-examine Clark on the subject of other graft payments is sustained by the authorities. The vast majority of cases support the use of evidence of separate and independent offenses to establish, plan, design, or scheme.

It is further submitted that under the authority of *Territory v. Izumi*, the rebuttal evidence of the prosecution was properly admitted by the trial court.

## II.

**The Supreme Court of the Territory of Hawaii Did Not Err in Holding That the Trial Court Properly Denied Defendant's Motion for a Directed Verdict.**

At the close of the Territory's case, defendant made a motion for a directed verdict on the ground of variance. Defendant contends that a variance exists between the allegations of the two indictments and the proof because the evidence showed that Appellant Caminos instead of receiving his regular share of bribe money



directly from Paul Au, was, in fact, receiving the money from Police Sergeant William Clark.

Appellant cites *State v. Sweeney*, (*supra*) in support of his contention that a variance exists between the proof and the indictments. However, in the Sweeney case the Supreme Court of Minnesota in ruling that there was not a variance between the proof and the indictment stated as follows on page 227:

“Defendant urges that the evidence shows that he and Maurer were accomplices in receiving an \$810 bribe from the agent of the General Motors Corporation, and that there was a fatal variance between the indictment and the proof. This is upon the theory that the transaction of the agent was exclusively with Maurer, but that both Maurer and defendant were the joint beneficiaries of the \$810, half of which it is asserted Maurer gave to defendant as a division of the spoils. Possibly the facts might have been so construed. The state construed the transaction differently and alleged that Maurer bribed defendant by giving him \$405. The jury have found this to be the fact. The finding is not without support in the evidence which, among other things, shows that defendant expressly refused to deal with the agent. Defendant’s corrupt intention and conduct rested exclusively upon his conduct with Maurer. The mutually cooperative corrupt arrangement was susceptible to the construction that one of the two men was to bribe the other, or vice versa, as occasion might arise. The finding is adverse to the contention of a variance.”

In *Commonwealth v. Connally*, 308 Mass. 481, 33 N.E. (2d) 303 (1941), two indictments were returned against defendant, a former elected Clerk of the Superior Court of Suffolk County, Boston, charging him with bribery. The two indictments contained several counts, each count alleged that defendant Connally, "did corruptly request and accept from," a named person, a specified sum of money,

"under an agreement and with the understanding that his, the said Connally's vote, opinion, judgment and decision should be given in a particular manner, and upon a particular side of a question, cause and proceeding which was then pending, and which might by law come and be brought before him, the said John P. Connally, in his official capacity" as such clerk and that in that capacity "he, the said John P. Connally, should make a particular nomination and appointment."

33 N.E. (2d) 303, 306.

During the trial no evidence was offered to show that defendant Connally received any payment directly. The evidence revealed that William T. Conway received the payments and paid the campaign obligations of the defendant. Several witnesses testified that they had paid Conway money in return for job security. Concerning this evidence, the Supreme Judicial Court of Massachusetts stated as follows:

"Assignments 4 to 15 inclusive, 19, and 31 attack the admission in evidence of dealings of the employees paying the bribes or their agents with Conway and Margaret W. Kennedy. The

objection is that the defendant was not present. But the case was tried on the theory Kennedy was a tool of Conway, and Conway the agent of the defendant, and further that the money paid went to the defendant. Sufficient evidence appeared, as has been shown, to support that theory. That made evidence of dealings with Kennedy and Conway competent. It is unimportant whether at the time the evidence of those dealings was admitted agency had been fully proved. It is sufficient that before the testimony was closed evidence to support that theory was in the case. The whole case could not be proved in one breath, and the order of proof of the different elements that in combination made up the case for the Commonwealth was within the control of the judge."

33 N.E. (2d) 303, 310.

It is respectfully submitted that since the evidence is clear that Police Sergeant William Clark, insofar as the appellant's share of bribe money was concerned, was merely a messenger boy, a conduit, collecting his share, and delivering Captain Caminos' share to him, no variance existed between proof and the indictments.

### III.

The Supreme Court of the Territory of Hawaii Did Not Err in Holding That There Was No Prejudicial Misconduct on the Part of the Trial Judge.

The alleged misconduct of the trial judge is made the basis of appellant's third specification of error. Appellant complains that the presiding judge was guilty of prejudicial misconduct in that such judge did belittle, berate, deprecate, rebuke and lecture defense counsel

and accuse them of being unfair and untruthful. (Op. Br. p. 40).

Appellant has listed in his opening brief, (page 41), several statements which were uttered by the trial judge during the course of the trial. These statements appear on the printed page of appellant's brief, naked and stripped of any background. Thus, we submit, an examination of the record is in order.

In the court's attempt to get Mr. Patterson to make his objections in an orderly manner, the transcript reveals the following:

"The Court: I suggest, Mr. Patterson, you do not interrupt the witness and make objection when his answer is unfinished; you're taking advantage of the witness, you're taking advantage of counsel, you're taking advantage of the Court; there's an orderly way to present an objection.

"Mr. Patterson: Most respectfully, Your Honor—when this man says 'he gave me the impression' I can't figure that out ahead of time—I most respectfully except to the remarks of the Court and assign them as error, if Your Honor pleases.

"The Court: Your objection is noted and the exception allowed. The Court requests you, in a very courteous tone of voice, Mr. Patterson, to please wait until the man has finished his answer; you'll be given an adequate hearing with your objections and the Court will make its ruling." (T. 144).

This statement by the court is listed as evidence of misconduct on the part of the presiding judge. (Op. Br. 41).



Appellant contends that the trial judge was guilty of prejudicial misconduct when he accused defense counsel of manufacturing evidence. From this, the appellant concludes that the trial judge charged defense counsel with being untruthful, "(inferentially, at least)." (Op. Br. 41).

The record reveals the following:

"The Court: (Interrupting): The Court will cut out the argument now in that fashion, Mr. Patterson. The sole question is one of law and not one of an argument to the Court on the credibility of witnesses; the question is one of law, whether you can manufacture opportunity for evidence by specifying names in a cross-examination on a collateral issue, that's the question of law involved. The Court will permit the one type of question from this witness and will lay the precedent if you have others of the same character, to simply ask the witness whether or not he received any division of the spoils from Mr. Clark on any occasion.

"Mr. Patterson: Thank you, Your Honor. Will you read that statement of His Honor's to me—

\* \* \*

"The Court: Yes; let me give it through, Mr. Patterson. I'll caution the jury that the Court is permitting this testimony; we're not trying the issues of other collateral matters, whether they did or did not happen; we're trying simply the issue as to Mr. Caminos, and this issue is as to the credibility of Mr. Clark as addressed in this particular case. (110)

"Mr. Patterson: Can I get the first part of Your Honor's statement?

"The Court: Yes.



“Mr. Patterson: I wish to take exception and assign as error the remarks of the Court that I took advantage of an opportunity to manufacture evidence, as being prejudicial to the defendant in this case; I have not done that; I didn’t even examine the witness Clark, Your Honor, I didn’t even examine him so I couldn’t be guilty of manufacturing evidence.

“The Court: Mr. Patterson, you are a member of the group of attorneys defending this case. The Court’s remark was that the proposition of law before the Court was whether the defense could manufacture opportunity for additional witnesses on collateral matters by specifying on cross-examination names, and that it was a question of law that in connection with the transactions alleged to have emanated from Paul Au of the delivery of money to Mr. Clark that I am permitting you to ask this witness or any other witness that was named in that history whether or not he received any split of the spoils alleged to have been given.” (T. 147-149).

We submit that the trial judge did not accuse defense counsel of manufacturing evidence. The record shows that the trial judge, at no time, accused defense counsel of being untruthful.

The trial judge is charged with having accused defense counsel of “deliberately violating rules of evidence.” (Op. Br. 41). An examination of the record reveals no such accusation. The Court, in addressing Mr. Patterson, made the following statement:

“The Court: Mr. Patterson, the Court dislikes the the necessity to call your attention to the obvious

thing that you know, that any party putting on a witness who is obviously surprised by the answers given on the witness stand by reason of the fact that such party is bound by that witness' statements unless they desire to impeach him from former inconsistent statements, the law allows a party who is thus surprised to impeach his own witness under specific rules of the statute, to it, calling the witness' attention to the time and place of the supposed inconsistent statement, giving him an opportunity to be heard thereon, and if the witness does not clearly admit the giving of the former statement, that the party has the right to prove, if he can, from any witness, the giving of the former inconsistent statement, a rule which you've been, as an attorney for more than 30 years, conversant with and its applicability here; and the Court is giving this instruction openly in the presence of the jury by reason of the type of argument that you've just made openly, as though it were something being tried by the prosecution that's out of order; and the Court wants the record to show, and if the Court is in error to give you the benefit of the error, to correct the statement in (114) the presence of the jury, that the law is that a party may by proper showing impeach his own witness, if having produced him under the responsibility of vouching for his truth they are taken by surprise and desire to show to the jury that they are not satisfied with the present truth of the witness' answers given. Now you may have your exceptions to the Court's pronouncement of law in the presence of the jury on that issue." (T. 152-153).

The duty of the court as provided under Territorial law is as follows:

“It shall be the duty of the Court to control all proceedings during the trial, and to limit the introductions of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the entire truth regarding the matters involved.”  
*Section 10118, Revised Laws of Hawaii, 1945.*

The general rule on the subject of correcting and admonishing counsel is stated in 23 *Corpus Juris Secundum*, 340-342 *Section 989*, as follows:

“While attorneys in a criminal prosecution are entitled to and must receive fair treatment at the hands of the trial court, as a general rule the court may, by words or conduct, properly caution, correct, advise, admonish, and, to a certain extent, criticize counsel during the case, provided it is done in such manner as not to subject counsel to contempt or ridicule, or to prejudice accused in the minds of the jurors; and it is the duty of the presiding judge to correct and check important and repeated errors of counsel. Accordingly, an admonition to the prosecuting attorney to examine witnesses carefully to avoid exceptions, or to counsel for accused to treat a witness respectfully, or to refrain from improperly interrupting the examination of witnesses, or to stay within the proper limits of cross-examination, is not error; but a remark or conduct by the judge conveying an unwarranted reprimand, or a severe criticism on the methods of, or discrimination against accused’s counsel, or an attack upon the motives of counsel with respect to particular conduct during the trial, or a statement that he or the jury has been deceived by him, or a reprimand for mis-

conduct in other cases, is improper. Manifestations of impatience by the court at the methods or requests of counsel are not only in bad taste but also may constitute error; but a remark that the cross-examination is unusually protracted is not improper where it is brought out by the fact that such cross-examination has been exceedingly prolix."

In *Territory v. Van Culin*, 36 Haw 153 (1942), the misconduct of the trial judge was based upon his assumption of the role of prosecutor. The record there revealed that the trial judge exhibited his bias and his unfriendly attitude towards the defendant when he asked defendant a total of sixty-eight questions.

The official report of *Grock v. United States*, 289 F. 544, reveals no facts of the trial court's misconduct. Similarly, no evidence of the trial judge's misconduct appears in the report of *Berger v. United States*, 295 U.S. 78, 55 S. Ct. 629, L. Ed. 1314.

In the case of *Lau Lee v. United States*, 67 F. (2d) 156, (1933), which is cited by the appellant, this court was also concerned with the conduct of Mr. Patterson and the resulting remarks of the presiding judge. The trial judge in the Lau Lee case, in the presence of the jury, accused Mr. Patterson of being untruthful, not honest and straightforward with the jury, and with having intentionally misled the jury. This court held that the statements of the trial judge were prejudicial.

Judge Wilbur, speaking for the court in *Lau Lee v. United States*, stated, at page 159:



“On the other hand, the court has the right to correct erroneous or misleading statements made by the attorneys with reference to the evidence and resulting prejudice to the defendant must be borne by them . . .”

We submit that the Lau Lee case and the instant case are distinguishable on the facts. The trial judge in the present case made no comment, at any stage of the trial, that defense counsel were dishonest or that a bad motive existed.

Judge Learned Hand has succinctly phrased the role of the trial judge in the following statement:

“Criminal prosecutions are not to test the trial judge’s adeptness in answering questions of law, put to him in multitude, often in the heat of sharp dispute. Trials are to winnow the chaff from the wheat; when the accused has had fair opportunity to answer the charge; when it has been lawfully proved, and fair men have found him guilty, our duties end.”

*United States v. Cotter*, 60 F. (2d) 689 (C.C.A. 2d, 1932), at page 694.

#### IV.

The Supreme Court of the Territory of Hawaii Did Not Err in Holding That the Defendant’s Assignment of Error in Regard to Certain Instructions Was Without Merit.

The fourth specification of error concerns the trial court’s refusal to instruct the jury on the subject of character evidence as requested by the defendant. The three requested instructions of the defendant are as follows:



**DEFENDANT'S INSTRUCTION NO. 23**

"I instruct you that in this case the defendant Caminos has offered witnesses for the purpose of showing his good character. When he does so he puts his character in issue, and having done so the prosecution was at liberty, under the law, to bring witnesses before the court to show that the defendant was not a man of good character."

This instruction is listed on page 50 of transcript as having been refused.

**DEFENDANT'S INSTRUCTION NO. 24**

"I instruct you that the prosecution has not produced any witnesses in this court tending to show that the defendant Caminos is not a man of good character or reputation; and the testimony of certain witnesses for the prosecution that is in conflict with the testimony of the defendant is not to be considered by you as character evidence but only for the purpose of deciding the issue in this case as to whether or not the defendant is guilty under the evidence in accordance with the instructions that have been given and will be given to you by this court."

This requested instruction is also listed in the transcript on page 50 as having been refused by the trial court.

**DEFENDANT'S INSTRUCTION NO. 27**

"You are instructed that if you should find and believe that the prosecution failed to produce available evidence in this case, you are entitled to consider the failure of the prosecution to produce witnesses and such evidence in arriving at a ver-

dict in this case as to whether or not the defendant is guilty or not guilty."

The record shows that this instruction was "refused as argumentative." (T. 50).

The trial court charged the jury as requested in Defendant's Instruction No. 20 as follows:

"The court instructs the jury that the defendant has introduced evidence before you tending to show his good character for honesty, truth and veracity. If, in the present case, the good character of the defendant for these qualities is proven to your satisfaction, it is to be considered by you in connection with the other facts in the case; and if after consideration of all the evidence in the case, including that bearing upon the good character of the defendant, the jury entertains a reasonable doubt as to defendant's guilt, then I charge you it is your duty to acquit him, and a further charge that good character itself may create a reasonable doubt and entitle the defendant to an acquittal, even though without such proof of good character you would convict."

We submit that the above-quoted instruction sufficiently informed the jury of the effect of character evidence.

*Terr. v. Marks*, 25 Haw. 219, (1919).

*Terr. v. Martins*, 28 Haw. 187, (1925).

The use of evidence of other offenses, which the Territory contends, was injected into the case by the appellant himself, was never offered as evidence of the appellant's bad character. Such evidence was devel-

oped on the re-direct examination of Fat Loo when the matter of similar pay-offs was introduced in Fat Loo's cross-examination.

Professor Wigmore in discussing the use of other similar offenses distinguishes such use from the character rule, as follows:

*"CRIMINALITY OF ACT IMMATERIAL; CHARACTER RULE, DISTINGUISHED.* It has already been noted (ante 216) that the criminality of prior acts thus offered does not affect their admissibility. Either they are relevant, by the above tests, or they are not; if they are not, they are rejected because they are irrelevant; if they are, they are received in spite of their criminality. The only bearing of the latter quality is that, if they are irrelevant, it furnishes another reason for excluding them, namely, the reason of Undue Prejudice, as enforced in the Character Rule (ante, 194); for these other criminal acts would not merely be irrelevant, but would go to evidence the defendant's character and career as bad and thus to create undue prejudice—a mode of argument against him that is forbidden by a fundamental principle.

"It is, however, to this reluctance to violate the Character Rule that is due the strictness shown by the Courts in excluding prior criminal acts which do not strictly fulfill the rigorous tests just examined. If the admission of irrelevant evidence had been the only consequence of an error in the ruling, there would undoubtedly have been seen a greater liberality in the judicial application of the foregoing tests. The unsatisfactory result has been that, in this narrow and over-cautious

anxiety not to infringe upon the Character Rule, evidence highly appropriate to show Knowledge, Intent, or Design, and amply fulfilling the proper tests for that purpose, has often been excluded.

“Of the other objections (than Undue Prejudice) from the point of view of that auxiliary policy which creates the Character Rule (ante, 194), the objection of Unfair Surprise is the only one that could be supposed to be here applicable. But it has never been treated by the Courts as of consequence. This rational and practical conclusion is easily understood when it is remembered that any other conclusion might result in shutting out most of the appropriate evidence, of this and other sorts, to prove a crime. The legal objection of Unfair Surprise so far as it is ever recognized, is not founded on the notion that the opponent was not in fact anticipating this specific evidence (post, 1845, 1849), but on the notion that he could not have anticipated evidence which might easily be fabricated beyond detection; and the objection is recognized as having force only when the evidence offered is of a class capable of involving the entire range of the person’s life. Evidence tending to show, not the defendant’s entire career, but his specific knowledge, motive, design, and the other immediate matters leading up to and succeeding the crime, is of a class always to be anticipated and is in each given instance rarely a surprise; moreover, the kernel of the objection of unfair surprise, namely, the impossibility of exposing fabricated evidence, is wanting where the evidence deals with matters so closely connected with a crime as design, motive, and the like”:

*II Wigmore, Sec. 305, pp. 205, 206, 3rd ed.*



We respectfully submit that the use of rebuttal witnesses became necessary when the defendant, as a witness in his own behalf, testified on direct examination that he never received bribes from Clark "or any other person." (Op. Br. 10).

## V.

The Supreme Court of the Territory of Hawaii Did Not Err in Sustaining the Ruling of the Lower Court Overruling the Objection of the Defendant to the Giving of Certain Instruction Assigned as Error Under Specification of Error No. 5.

The instruction in question assigned as error under Specification of Error No. 5 reads:

"The court further instructs you, gentlemen of the jury, that if you find from the evidence in this case beyond a reasonable doubt that the defense set up by the defendant is a false and fabricated defense and was purposely and intentionally invoked by the said defendant then you are instructed that such a false and fabricated defense forms the basis of a presumption against him because the law says that he who resorts to perjury to accomplish an end, this is against him and you may take such action as the basis of presumption of guilt." (See *Transcript of Record* pp. 180-181).

In dismissing the objection of the defendant to the giving of the above instruction, the Supreme Court of the Territory of Hawaii once again reaffirmed the long established precedent firmly embedded in the criminal jurisprudence of the Territory of Hawaii. The attitude of the Supreme Court in refusing to entertain



further hearing on the error assigned in Specification of Error No. 5 in effect confirms the legality of it.

In *Territory v. Truslow*, 27 Haw. 109 (1923), the Supreme Court of the Territory of Hawaii was confronted with the validity of the instruction for the first time. The instruction of the trial court as given to the jury over the objection of the defendant reads:

“If you find from the evidence in this case beyond a reasonable doubt that the defense set up by the defendant Truslow is a false and fabricated one and if you further find that such false and fabricated defense was purposely and intentionally invoked by the defendant then you are instructed that such a false and fabricated defense forms the basis of a presumption against him because the law says that he who resorts to perjury to accomplish an end, this is against him and you take such action as the basis of a presumption of guilt.”

In overruling the objection of the defendant to the giving of the above instruction to the jury, the Supreme Court through the majority opinion written by Chief Justice Peters said:

“The facts testified to by the defendant and all the circumstances of the case tend to support the inference that the original authority of July, 1920, in respect to the sale of Branco’s stock, had never been modified or revoked by Branco but was in full force and effect at the time that the defendant ordered the sale of the balance of the Olaa stock remaining unsold on April 11, 1921, and that the defense was a false and fabricated

one. If true, it would have been an absolutely good defense. The jury by its verdict stamped it as false. The defense was the product of the defendant. Its sole support was in the evidence of the defendant. This is not a case of mere conflict in the evidence. The defendant attempted by evidence extraneous to the main issue as developed by the prosecution to construct a defense to which he thought death had removed all likelihood of denial. As said by the court in *Beck v. State*, 80 Ala. 1: 'There is a principle of law, that if a fraud on the court be attempted, in the getting up of false testimony, or by any other artifice tending, or designed to deceive or mislead, or to make the false appear to be the true, and this is knowingly assisted, or procured to be done by the suitor, this is a circumstance which the jury may rightly consider, to the disadvantage of the party making or assisting in such attempt. An honest cause, the law considers, needs not the aid of such reprehensible methods. But, to justify the application of this principle, there must be some proof of it, or testimony of facts or circumstances, tending to support such inference. Mere conflict among witnesses examined on the opposing side, without more, does not and cannot raise such inquiry, or bring the principle referred to into play.' "

*Territory v. Truslow*, *supra*, at pp. 118-119.  
See *Territory v. Wong*, 30 Haw. 819, 828.

In *Territory v. Wong*, 30 Haw. 819 (1929), wherein the defendants were convicted of attempted bribery, one of the errors complained of was to the giving by the trial court over the objection of the defendant the following instruction:

“The court further instructs you, gentlemen of the jury, that if you find from the evidence in this case beyond a reasonable doubt that the defense set up by the defendant Solomon Wong, is a false and fabricated one and if you further find that such false and fabricated defense was purposely and intentionally invoked by the said defendant then you are instructed that such a false and fabricated defense forms the basis of a presumption against him because the law says that he who resorts to perjury to accomplish an end, this is against him and you take such action as the basis of a presumption of guilt.”

As in the preceding case of *Territory v. Truslow*, *supra*, the Supreme Court of the Territory of Hawaii again sustained the ruling of the trial court overruling the objection and exception of the defendant to the giving of the aforementioned instruction. The court there said:

“The argument advanced is that if an accused sets up a false and fabricated defense he may be convicted under such an instruction as this, even though there is absolutely no evidence before the jury tending to show his guilt; and that the instruction as given was in effect a direction to the jury to convict the defendant if it found that his defense was false and fabricated. We think that the instruction ought not to be so understood and that it is not susceptible of the construction. The words of the instruction are that if the defense is found to be false and fabricated it ‘forms the basis of a presumption’ against the defendant and that ‘such action’ is ‘the basis of a presumption of guilt.’ This means, and was doubtless intended

to mean, even if the instruction is read as though standing alone, that the jury may regard the intentional false defense as justifying a presumption of guilt. There is certainly no express direction in the instruction that the jury must convict if it finds that the defense was fabricated. There is no express direction that the jury *must* draw a presumption of guilt if the defense is fabricated. It is merely told that the presentation of such a defense forms the basis of, that is, justifies, a presumption of guilt. It is just as though the instruction in the last sentence had read: 'You *may* draw' a presumption of guilt. The jury was not told, 'You take a presumption of guilt' or 'You draw a presumption of guilt.' The direction was instead, 'You take or regard such action as the basis or foundation or justification of a presumption of guilt.' "

*Territory v. Wong, supra*, at pp. 827-828.

In addition thereto, the Supreme Court of the Territory of Hawaii from time to time has seen fit to follow and reaffirm the rulings made in the foregoing cases.

*Territory v. Young*, 32 Haw. 628, 658 (1933).  
*Territory v. Abellana*, 38 Haw. 533, 544-548 (1950).

The opinions sustaining the validity of such an instruction is not necessarily or by any means confined to the decisions of the Hawaiian tribunal. Such is evident from the opinions of cases decided in other jurisdictions. In fact, the leading case, if not the most authoritative, is a federal case and not Hawaiian. *Allen*



*v. United States* decided on December 7, 1896 and reported in 164 U.S. 492, is the case, and it is the underlying authority upon which the Hawaiian cases find support and weight as such.

In the case of *Allen v. United States, supra*, wherein the defendant was tried three times and on the third trial was convicted of murder, one of the rulings assigned as error by the defendant was the giving of the following instruction:

“You will understand that your first duty in the case is to reject all evidence that you may find to be false; all evidence that you may find to be fabricated, because it is worthless, and if it is purposely and intentionally invoked by the defendant it is evidence against him; it is the basis for a presumption against him, because the law says that he who resorts to perjury to accomplish an end, this is against him and you may take such action as the basis of a presumption of guilt.”

In sustaining the ruling of the Circuit Court of the United States for the Western District of Arkansas, the Supreme Court of the United States, through Justice Brown said:

“There was certainly no error in instructing the jury to disregard evidence that was found to be false; and the further charge that false testimony, knowingly and purposely invoked by defendant, might be used against him, is but another method of stating the principle that the fabrication of testimony raises a presumption against the party guilty of such practice.”



Though the cases cited hereinafter do not involve the validity of any instruction such as the one now under consideration, they are in accord with the general principle of law upon which the legality of the instruction is established.

*Lindsey v. U.S.*, 264 F 94 (1920).

*Waller v. U.S.*, 179 F 810 (1910).

*Wilson v. U.S.*, 162 U.S. 613, 40 L. Ed. 1090, 16 Sup. Ct. 895 (1896).

*Commonwealth v. Spezzaro*, 250 Mass. 454, 146 N.E. 3 (1925).

*People v. Arnold*, 43 Mich. 303, 5 N.W. 385 (1880)

*Commonwealth v. Devaney*, 182 Mass. 33, 64 N.E. 402 (1902).

The case of *Bollenbach v. United States*, 326 U.S. 607, 66 S. Ct. 402, 90 L. Ed. 350, cited by the appellant on page 51 of his brief is not an authority which concerns this case. In the *Bollenbach case*, the Supreme Court of the United States was faced with the problem of determining the legality of a following instruction:

“Of course if it occurred afterwards it would not make him guilty, but in that connection I say to you that if the possession was shortly after the bonds were stolen, after the theft, it is sufficient to justify the conclusion by you jurors of knowledge by the possessor that the property was stolen. And, just a moment—I further charge you that possession of stolen property in another state than that in which it was stolen shortly after the theft raises a presumption that the possessor was a thief and transported stolen property in interstate commerce, and that such presumption

is subject to explanation and must be considered with all the testimony in the case.”

It held that the above instruction constituted a prejudicial error in that it was misleading to the jury. Be that as it may, the case did not decide on any issue material to the case at bar and for that reason is inapplicable.

As to the contention advanced by the appellant on page 51 of his brief that if the defendant sets up a false defense, such conduct has the effect of converting the presumption of innocence to presumption of guilt and that the defendant's guilt would be determined by his false defense, see *Territory v. Wong*, *Supra*, on pages 827-828, where the court faced with the identical type of instruction said:

“The argument advanced is that if an accused sets up a false and fabricated defense he may be convicted under such an instruction as this, even though there is absolutely no evidence before the jury tending to show his guilt; and that the instruction as given was in effect a direction to the jury to convict the defendant if it found that his defense was false and fabricated. We think that the instruction ought not to be so understood and that it is not susceptible of that construction. The words of the instruction are that if the defense is found to be false and fabricated it ‘forms the basis of a presumption’ against the defendant and that ‘such action’ is ‘the basis of a presumption of guilt.’ This means, and was doubtless intended to mean, even if the instruction is read as though standing alone, that the jury may regard the in-

tentional false defense as justifying a presumption of guilt. There is certainly no express direction in the instruction that the jury must convict if it finds that the defense was fabricated. There is no express direction that the jury must draw a presumption of guilt if the defense is fabricated. It is merely told that the presentation of such a defense forms the basis of, that is, justifies, a presumption of guilt. It is just as though the instruction in the last sentence had read: 'You *may* draw' a presumption of guilt. The jury was not told, 'You take a presumption of guilt' or 'you draw a presumption of guilt.' The direction was instead, 'you take or regard such action as the basis or foundation or justification of a presumption of guilt.' "

The other argument of the appellant that the presumption of guilt is not compatible with due process of law in the light of the pervading rule of presumption of innocence in criminal cases is not tenable.

The presumption of innocence, according to the famous textbook writers and authoritative treatises, means nothing more than to say that in criminal cases the burden of proof rests with the prosecution to adduce evidence and convince the jury of defendant's guilt.

See: *Wigmore on Evidence*, Vol. IX, Sec. 2511, p. 407, (3rd Ed. 1940).

*Wharton's Criminal Evidence*, Vol. I, Sec. 72, pp. 85-88 (11th Ed. 1935).

*Underhill's Criminal Evidence*, Chap. VI, Sec. 50, p. 45 (3rd Ed. 1923).

And Professor Thayer in his famous lecture on the Presumption of Innocence in Criminal Cases, which is generally recognized as the best treatment of the subject extant, and in which the rule announced in *Coffin v. United States*, 156 U.S. 432, 39 L. Ed. 481, 15 Sup. Ct. Rep. 394, is analyzed and utterly refuted, says:

“Now, what does the presumption of innocence mean? Does it need not be proved; and as to the matter mean anything more than a particular application of that general rule of sense and convenience, running through all the law, that men in general are taken, *prima facie*—i. e., in the absence of evidence to the contrary—to be good, honest, free from blame, presumed to do their duty in every situation in life, so that no one need go forward, whether in pleading or proof, to show as regards himself or another that the fact is so but everyone shall have it presumed in his favor? If it does, what is its meaning? And after tracing the history of the presumption, he continues: ‘It is important to observe this, because, by a loose habit of speech, the presumption is occasionally said to be itself evidence, and juries are told to put it in the scale and weigh it. Greenleaf, in a single phrase in the first volume of his treatise on Evidence (34), a phrase copied occasionally into cases and text-books, has said: ‘This legal presumption of innocence is to be regarded by the jury in every case as matter of evidence, to the benefit of which the party is entitled.’ This statement is condemned by the editor of the last edition of Greenleaf’s book; and in Taylor on Evidence, the great English handbook, which followed Greenleaf’s text closely, this passage is



omitted, and always has been omitted. In the latter part of Greenleaf's Evidence (vol. 3), which deals specifically with criminal cases, it does not appear. It is denied also by Chamberlayne, the careful editor of the works on Evidence of Best and Taylor. What can such a statement as this mean,—that the presumption is to be regarded as evidence? Is it meant that, on grounds of natural presumption or inference, innocence is ordinarily found in criminal cases? As to that, if one would see the true operation of natural inference and natural presumption in criminal cases, and would appreciate how entirely artificial, how purely a matter of policy the whole rule is which bids a jury on the trial to assume innocence, let him turn his attention to the action of courts at other stages than the trial.' And after proceeding to show that, after indictment found, the law presumes the defendant guilty for the purpose of determining whether bail shall be granted and in fixing the amount thereof, and for all other purposes except that of having a fair and impartial trial before a petit jury, he proceeds: 'The effect of the presumption of innocence, so far from being that of furnishing to the jury evidence,—i. e., probative matter, the basis of an inference,—is rather the contrary. It takes possession of this fact, innocence, as not now needing evidence, as already established *prima facie*, and says: 'Take that for granted. Let him who denies it go forward with his evidence.' And he concludes as follows: 'A presumption itself contributes no evidence, and has no probative quality. It is sometimes said that the presumption will tip the scale when the evidence is balanced. But, in truth, nothing tips the scale but evidence, and a pre-



sumption—being a legal rule or a legal conclusion—is not evidence. It may represent and spring from certain evidential facts; and these facts may be put in the scale. But that is not putting in the presumption itself. A presumption may be called ‘an instrument of proof,’ in the sense that it determines from whom evidence shall come, and it may be called something ‘in the nature of evidence,’ for the same reason, or it may be called a substitute for evidence, and even ‘evidence,’ in the sense that it counts at the outset for evidence enough to make a *prima facie* case. But the moment these conceptions give way to the perfectly distinct notion of evidence proper,—i. e., probative matter, which may be a basis of inference, something capable of being weighed in the scales of reason and compared and estimated with other matter of the probative sort,—so that we get to treating the presumption of innocence or any other presumption, as being evidence in this its true sense, then we have wandered into the region of shadows and phantoms.

*Thayer's Preliminary Treatise on Evidence*, 1898, Appx. B, p. 551.”

*Culpepper v. State*, 4 Okl. Cr. 103, 111 Pac. 679 (1910).

“The presumption of innocence and proof of guilt must always be kept separate and distinct. The presumption of innocence is a conclusion of law in favor of the accused, whereby his innocence is not only established, but continues until sufficient evidence is introduced to overcome the proof which the law has created—namely his innocence.”

See *Wharton's Criminal Evidence*, Vol. I, Sec. 72, p. 87 (11th Ed. 1935).

"The presumption of innocence is a rebuttal of presumption and it must yield to evidence. It is overcome when the accused is proven guilty beyond a reasonable doubt in a fair and impartial trial. It has been said that it may be overcome by a statutory presumption expressly making proof of certain facts prima facie evidence of another fact. The presumption is not, however, overcome by evidence of facts which are not plainly inconsistent with innocence, by mere proof that a person had an opportunity to commit the crime charged, if he was so inclined, without evidence that a crime was, in fact, committed, or by the failure of the accused to testify in his own behalf. An opinion based upon probability is wholly insufficient to overcome it.

"If evidence of alibi is offered to fortify the presumption of innocence, it must appear to a certain degree of persuasion in order to sustain the defense or raise a reasonable doubt as to the defendant's guilt; but this requirement does not take from the accused the benefit of his presumption of innocence. Even though the alibi is not established, the presumption of innocence remains and the evidence in the case may be enough to raise a reasonable doubt of guilt."

See *Wharton's Criminal Evidence*, *supra*, at Sec. 74, p. 90-91.

#### CONCLUSION

In conclusion, it is respectfully submitted that the errors assigned are without merit and the judgment appealed from should be affirmed.

Dated at Honolulu, T. H., this 25<sup>th</sup> day of May,  
A.D. 1951.

Respectfully submitted,

Allen R. Hawkins

ALLEN R. HAWKINS  
Public Prosecutor  
of the City and County of Honolulu

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*Attorneys for Appellee.*

RECEIPT of three copies of the foregoing Brief is  
acknowledged this.....day of May, A.D. 1951.

FRED PATTERSON, PETER A. LEE AND O. P. SOARES

Per.....

*Attorneys for Appellants*



No. 12,769

IN THE

United States Court of Appeals  
For the Ninth Circuit

---

CLARENCE C. CAMINOS,

VS.

TERRITORY OF HAWAII,

*Appellant,*

*Appellee.*

On Appeal from the Supreme Court of the  
Territory of Hawaii.

APPELLANT'S REPLY BRIEF.

---

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FILED  
OCT 11 1951  
PAUL A. O'BRIEN





## Table of Authorities Cited

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	Pages
Territory v. Abellana, 38 Haw. 533 .....	4, 10, 15
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**APPELLANT'S REPLY BRIEF.**

---

**I.**

Answering appellant's argument in support of Specification of Error No. 1 that the court erred in holding that evidence of separate and independent crimes of bribery were admissible, appellee argues:

That evidence of other bribe payments was introduced by the appellant during the cross-examination of William Clark. (Terr. Ans. Br. p. 5.)

The questions put to the prosecution's witness Clark on cross-examination were limited to bribes taken by Clark, and by no question on cross-examination was

it attempted to show that defendant had or did not have, any connection with such bribes.

Appellee predicates its argument on this point on its assertion on page 7 of its Answering Brief that the quoted portion of the cross-examination of William Clark (found also on pp. 78-80 of the printed Transcript of Record) “\* \* \* established the further fact that defendant Caminos, like Clark, was also receiving regular bribe payments from Paul Au and from other Honolulu gamblers.”

A perusal of the testimony referred to shows that appellee's assertion by way of premise upon which to base its argument is false. In the cross-examination referred to the reference to “bribe payments from Paul Au and from other Honolulu gamblers” is limited to payments to Clark and no reference whatsoever is made to payments to defendant by Paul Au and other Honolulu gamblers. True, Clark answered to a question on cross-examination as to how much he (Clark) got from a gambler known as Small Snake, and volunteered the statement, not in response to any question, that of the amount he received, the defendant got \$2,500.00 “and the other goes to the boys,” who the boys were not being shown nor is it shown that they had any connection with the defendant.

The court's attention is again respectfully invited to the cross-examination of William Clark appearing on pages 78 to 80 of the Transcript of the Record and quoted in appellee's brief on pages 5 to 7 and



which forms the basis for appellee's argument that evidence of separate and independent crimes of bribery was admissible.

The evidence sought by the cross-examination of Clark was limited to crimes committed by him and hence could not be made the basis for adducing evidence of other bribery payments particularly the direct evidence given by the prosecution's witnesses Rodenhurst, Lawrence Fat Loo, Mikami, Tantog, and Priopios.

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## V.

Answering appellant's argument in support of Specification of Error No. 5, that the court erred in the giving of the following instruction:

"The court further instructs you, gentlemen of the jury, that if you find from the evidence in this case beyond a reasonable doubt that the defense set up by the defendant is a false and fabricated defense and was purposely and intentionally invoked by the said defendant then you are instructed that such a false and fabricated defense forms the basis of a presumption against him because the law says that he who resorts to perjury to accomplish an end, this is against him and you may take such action as the basis of presumption of guilt." (See Transcript of Record pp. 180-181.)

appellee argues that the Supreme Court "once again reaffirmed the long-established precedent firmly em-

bedded in the criminal jurisprudence of the Territory of Hawaii” and “confirms the legality of it.”

It is respectfully submitted that appellee’s assertion that the giving of the instruction in question in cases such as the case at bar is a “long-established precedent firmly embedded in the criminal jurisprudence of the Territory of Hawaii” is wholly without foundation.

This instruction had been before the Supreme Court of the Territory of Hawaii exactly four times before the instant case:

1. *Territory v. Truslow*, 27 Haw. 109;
2. *Territory v. Wong*, 30 Haw. 819;
3. *Territory v. Young*, 32 Haw. 628; and
4. *Territory v. Abellana*, 38 Haw. 533.

None of those cases is a case of (to use the language of Mr. Chief Justice Peters in *Territory v. Truslow*, *supra*) “mere conflict in the evidence.” But each was a case in which (to again quote from the opinion written by Mr. Chief Justice Peters in the *Truslow* case) “the defendant did not limit himself to a mere denial of his acts as shown by the evidence but, out of whole cloth, the defendant fabricated a story.”

The following will serve to show the kind of case submitted by the defendants which called forth the instruction now under consideration:

In *Territory v. Truslow*, 27 Haw. 109, as gleaned from the opinion of the court delivered by Mr. Chief Justice Peters beginning on page 112, the official report of the "fabricated defense" which gave rise to the giving of the instruction which was almost word for word the instruction complained of in the case at bar and now under consideration was as follows:

"\* \* \* At the close of the prosecution's case there was no evidence tending directly or indirectly to show that the contract of July, 1920 had been modified or revoked. On the contrary, the evidence was susceptible of but the one inference,—that on April 11, 1921, at the time that the balance of the Olaa stock was sold by the defendant, the authority previously conferred had been neither modified nor revoked but was in full force and effect and that the stock had been sold contrary to the instructions given in respect thereto and without the consent and against the will of the owner, Manuel Branco." (p. 113.)

The evidence further showed that the owner of the stock having died subsequent to the unauthorized sale of the stock in question, the defendant, acting as executor, filed a sworn inventory showing the stock as part of the assets of the estate notwithstanding the same had been sold by the defendant in the lifetime of the owner without the owner's having been notified of the sale which had taken place months before his death.

The defendant did not limit himself to a mere denial of his acts as shown by the evidence but, out of whole cloth, the defendant fabricated as his defense a story to the effect (quoting from page 112 of the decision of the Supreme Court of Hawaii)

“\* \* \* that the original authority to sell of July, 1920 was modified by Branco on March 29, 1921, the limitation upon the selling price of the stock having been then removed by him and the defendant authorized to sell at such price as he, in his judgment, should deem advisable,—later, however, if the price of Olaa went lower, to buy in again to the same amount.”

Said the court, through Mr. Chief Justice Peters (p. 118):

“\* \* \* The defense was the product of the defendant. Its sole support was in the evidence of the defendant. This is not a case of mere conflict in the evidence. The defendant attempted by evidence extraneous to the main issue as developed by the prosecution to construct a defense to which he thought death had removed all likelihood of denial.”

In *Territory v. Wong*, 30 Haw. 819 (wherein the defendant was charged with attempted bribery), the prosecution's case depended on evidence to the effect (quoting from page 826)

“that on July 13, 1927 the defendant Wong had a preliminary conversation with Ross in which the proposed bribery was discussed; that on July 18, Wong with Apana and Ah Ping proceeded



in an automobile to the home of Ross at Wailupe, a distance from the center of Honolulu of about seven miles, Wong taking with him the sum of \$200.00 in his pockets; that in proceeding to Ross's house, Wong intended to use this money for the purpose of bribing Ross with reference to the unlawful manufacture by Apana of intoxicating liquor; that after some conversation between Wong and Ross in the latter's home, Wong said, 'pull the shade down, I got the money here'; that Wong reached in his pocket and drew therefrom some money; that when Wong said, 'Pull the shade down', Ross went over towards the window to pull the shade down, and just then Charles Cassidy crawled out from underneath the *punee*, an article of furniture upon which Ross and Wong had been sitting. Cassidy was, at the time, a deputy city and county attorney."

Briefly stated, to quote from page 827 of the court's opinion, the defense presented by Wong's testimony was that Ross himself had invited and instigated the bribery.

In *Territory v. Young*, 32 Haw. 628, wherein the defendant was charged with committing the crime of rape, "the theory of the prosecution" (quoting from page 630 of the opinion of the court)

"was that the assault was committed on March 12, a few minutes before midnight. Two doctors testified that they made a physical examination of the prosecutrix shortly thereafter and within the same night and gave testimony tending to show that there had been hemorrhages in her eyes



and abrasions and contusions about her face and neck, indicating in their opinion, that she had been choked or strangled. One of the doctors also gave testimony to the effect that he had made an examination of the perineal region and described the conditions that he found, which taken together with the evidence of force found in her head and neck, tended to show the commission of the crime of rape. The testimony of these two physicians, taken by itself, would have been amply sufficient to support a finding by the jury, if the evidence was believed to be true, that the crime had been committed. In opening, however, the cross-examination of the prosecutrix, defendant's witness said to her, in open court and before the jury, 'We want the world to know, and especially you \* \* \* that on this night of March 12th, you were ravished, raped, assaulted, deflowered, and otherwise ill-treated,' and again during the examination of Dr. F. B. Faus, a witness for the prosecution, defendant by his counsel expressly admitted 'that the prosecuting witness was assaulted that night, forcibly,' and the presiding judge thereupon said, 'I would on that particular point say that the doctor could be informed that he is not here to particularly bear down upon that; the defendant admits it; there is no issue before this jury but that this prosecuting witness was raped on that occasion.'

"\* \* \* there was evidence clearly tending to support the finding that prior to the time of the assault the prosecutrix was acquainted with the defendant. Prosecutrix testified that towards the end of the dance and shortly before midnight, she

walked out with (one) Halm \* \* \* they saw the defendant peeping at them through a hedge; that she became alarmed and with Halm moved to another spot \* \* \* the defendant seized the prosecutrix and by force pulled her away from Halm's hold; that the defendant choked and strangled her, beat her and forced her down to the ground and that she thereupon temporarily lost consciousness; and upon reviving somewhat found that the defendant was in the commission of the act. Her identification of the defendant as her assailant was positive and direct. Halm gave testimony corroborating that of the prosecutrix in respect to the identity of the assailant \* \* \*

“In addition to this direct testimony there was other evidence, circumstantial perhaps, tending to support the view that it was defendant who committed the offense. A pair of trousers with a spot or smear on one knee was introduced in evidence, testified to as having been worn by defendant on the occasion in question and admitted at the trial by the defendant to have been so worn. The prosecution claimed that the smear was a soil from the premises where the assault occurred. The defendant, \* \* \* in his testimony at the trial claimed the smear came from a part of the athletic field at Kamehameha School in this city where, on the afternoon of the same day, March 12, he had lain on the ground. Dr. Hance gave testimony that \* \* \* he had made examinations of three samples of soil, to-wit: that from the place of the assault, that from Kamehameha field, and that from the trousers and that it was his conclusion that the soil from the trousers was

identical in kind with that from the place of the assault and was radically different from that obtained from Kamehameha field.

“There was also testimony of the finding, in a crushed condition, at the place of the assault, within a few minutes after the commission of the assault, of a package of Lucky Strike cigarettes and other testimony that the defendant was in the habit of smoking cigarettes of that kind and none other. There was also testimony that within a few minutes after the commission of the assault two handkerchiefs were found at the place of the assault, similar in kind to four others which were found at the home of the defendant within a few hours after the commission of the offense, and further testimony that prior to the day of the assault the wife of the defendant had bought for him six handkerchiefs of which the four were a part.

“It is true that the defendant, on the witness stand denied the accusation *in toto*. His defense was an alibi; and it is also true that there was other testimony which tended to support the theory of his defense.”

In *Territory v. Abellana*, 38 Haw. 532 (a rape case), Mr. Justice Towse, speaking for the court on pages 533 and 534, outlined that portion of the evidence for the prosecution pertinent to a consideration of the question of the propriety of giving the instruction as to the law of “fabricated defenses” as follows:

“\* \* \* The victim of the rape, a fifty-three-year-old woman, in company with the victim of



the robbery, an enlisted member of the United States Army, were walking ewa on the makai sidewalk of South King street in the vicinity of the entrance of the Catholic cemetery at about 6:30 o'clock p. m. Without warning both were confronted by two individuals unknown to them, one in military uniform later identified as Angelino P. Pacheco, Private First Class, United States Army, the other in civilian attire later identified as the defendant-plaintiff in error, hereinafter referred to as the defendant. Pacheco seized Jones' arm, leveled a .45 calibre United States Army automatic revolver at him and ordered him to proceed into the cemetery, the defendant simultaneously seizing Jones' female companion by the arm and also impelling her by force into the cemetery. At a *locus criminis* toward the rear of the cemetery Pacheco forced Jones, at the point of the weapon, to hand over to him the sum of three dollars cash together with his wallet. While this ensued, the defendant by force and against the will of the victim consummated the crime of rape. In doing so he forcibly tore and removed certain of her clothing, and inflicted bodily injuries by way of abrasions to the left upper thigh, scratches upon the left buttock, a blackened right eye, hematoma of the left cheek, contusions of the lips and loss of a tooth. The foregoing was established at trial by exhibits of the victim's false tooth, soiled white blouse together with one detached button, a torn and soiled white slip, a soiled white skirt, and a soiled undergarment. The defendant consummated his assault and ravishing of the victim within several feet and hearing distance of the

helpless escort who could render no aid nor resist the duo as he lay prone and motionless guarded at the point of the weapon by Pacheco.

“Upon consummation of rape, the defendant reversed roles with Pacheco, the weapon being passed from Pacheco to the defendant during the transposition. The defendant continued vigilance over Jones while Pacheco, by force and against the will of the victim, also raped her.”

The “fabricated defense” is included in the testimony of defendant detailed by the author of the opinion on pages 546-547 as follows:

“The defendant on direct examination testified that on the day in question and in company with Pacheco he saw the complaining witness and Sergeant Jones near the cemetery; that they had just come from Pacheco’s home and were walking toward town on King Street across from the cemetery when Pacheco told him to ‘duck in the yard’; that after a while Pacheco told him to go across the street with him and that they thereupon entered the cemetery and were walking through a ‘bunch of trees’ where the victim and Jones were; that the victim was twelve to fifteen feet away from Jones; that he and Pacheco approached Sergeant Jones and also the victim and asked ‘what she was doing in there’; that the victim looked like she had just gotten up or she was looking for something; that he inquired ‘what she was doing in there’ and ‘if she came in there to have intercourse with the soldier,’ which she denied; that he then suggested intercourse with her and that she replied ‘all right’;



that she thereupon voluntarily consummated sexual intercourse with him and assisted him in all respects; that thereafter Pacheco approached him and gave him the weapon and that he went over to Jones who was 'lying down on the ground'; that he only went near Jones but did not 'face the gun on him' but 'faced it away from him'; that when Pacheco upon consummation was walking out with the victim the defendant inquired where they were going to which Pacheco replied that the victim was 'going to get two more girls for us'; that he had returned the gun to Pacheco as Pacheco was returning to the King Street entrance with the victim; that he at no time beat or punched the victim; that she did not 'resist, scream, kick, bite me, or try to push me way'; that the victim had sexual intercourse with him willingly; that he did not know 'at any time' that Pacheco had robbed Jones of any money.

"Upon cross-examination: That at the time he and Pacheco entered the cemetery he did not know Pacheco had a gun. The defendant was accorded opportunity to reconcile prior inconsistent statements, viz.: that he and Pacheco were not at any time in the vicinity of the cemetery on the day in question; that previous to seeing the victim at the police station he had not seen her at any time on the day in question; that he had not seen Jones at any time previous to seeing him at the police station in the early morning of September 23, all of which prior inconsistent statements the defendant failed to reconcile or explain in any degree commensurate with reasonable conformance."

None of the Hawaiian cases or of the cases in other jurisdictions which we have examined goes so far as to say that the instruction complained of would be proper in every criminal case in which the defendant denies the allegations of the indictment.

Three of the five cases in Hawaii merely held that the instruction did not contain the connotation which the defendants gave it. One, the *Truslow* case, went further than any of the others to point out that the defense was, indeed, a fabricated defense and not a mere denial of guilt or of conflict in the evidence. The other, the instant case, brushed aside without a word the contention not theretofore advanced in any prior case before the local Appellate Court but most certainly recognized by that court as the law, that before the instruction complained of could be given there must be interposed a defense that goes further than to merely contradict the government's case; a defense that is "made out of whole cloth", a defense that is "fabricated".

In the case at bar, it was prejudicial error to give the instruction on "fabricated evidence" for that the defendant confined himself to a categorical denial of the charges against him and did not resort to manufacturing a defense as did the defendants in the Hawaiian cases cited by appellee in support of the giving of the instruction complained of. (*Truslow*: a new and modified contract; *Wong*: that the officer had himself invited and instigated the bribery; *Young*:

alibi; and *Abellana*: voluntary submission to sexual intercourse by the prosecutrix who charged rape.)

Dated, Honolulu, Hawaii,  
July 11, 1951.

Respectfully submitted,

FRED PATTERSON,

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*Attorneys for Appellant.*



No. 12770

United States  
Court of Appeals  
for the Ninth Circuit.

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ETTORE G. STECCONE, an Individual Doing  
Business Under the Firm Name and Style of  
STECCONE PRODUCTS CO.,

Appellant,

vs.

MORSE-STARRETT PRODUCTS CO., a Corpo-  
ration,

Appellee.

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Transcript of Record

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Appeal from the United States District Court,  
Northern District of California,  
Southern Division.

FILED  
MAY 27 1951

PAUL P. O'BRIEN,





No. 12770

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## INDEX

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In The District Court of the United States for the  
Northern District of California, Southern  
Division

No. 27081-E

MORSE-STARRETT PRODUCTS CO., a Corpor-  
ation,

Plaintiff,

vs.

ETTORE G. STECCONE, an Individual Doing  
Business Under the Firm Name and Style of  
Steccone Products Co.,

Defendant.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to Rule 52 of the Federal Rules of Civil  
Procedure and Rule 5 (e) of the Rules of Practice  
of the District Court of the United States for the  
Northern District of California, the Court makes  
the following Findings of Fact and Conclusions of  
Law:

### Findings of Fact

#### I.

That plaintiff, Morse-Starrett Products Co., is  
a corporation duly organized and existing under and  
by virtue of the laws of the State of California, and  
has a place of business in the City of Oakland,  
County of Alameda, State of California.

#### II.

That defendant Ettore G. Steccone, is an indi-



vidual and a resident of the City of Oakland, County of Alameda, State of California.

### III.

That plaintiff adopted the trade-name "Steccone" for squeegees early in the year 1939 and applied said trade-name enclosed by an oval to its goods in interstate commerce at that time.

### IV.

That plaintiff's adoption and use of the trade-name "Steccone" was with the full knowledge and approval of defendant and was without any objection by the defendant.

### V.

That defendant knew or should have known from November, 1940, that plaintiff was expending considerable sums of money in making, selling and advertising its article as the "Steccone" squeegee.

### VI.

That defendant knew at various times that plaintiff was taking steps to prevent defendant from making, selling and advertising a squeegee as the "Steccone" squeegee.

### VII.

That despite such knowledge on the part of the defendant, defendant allowed plaintiff to continue to make and push the sale of squeegees at considerable cost and expense and until October 16, 1942, defendant said nothing.

## VIII.

That defendant by failing to seasonably object to plaintiff's adoption and continued use of the trade-name "Steccone" is estopped to deny that plaintiff is the owner of the trade-name "Steccone" enclosed in an oval as applied to squeegees and is entitled to the exclusive use thereof as against this defendant.

## IX.

That defendant secured United States Letters Patent No. 2,123,638, dated July 12, 1938, for a squeegee, and defendant granted to plaintiff a license to manufacture and sell squeegees under said United States Letters Patent No. 2,123,638, said license being evidenced by two agreements dated November 21, 1938, and December 3, 1938, respectively.

## X.

That defendant, upon the execution of said license agreements with plaintiff, turned over to the plaintiff at cost, less depreciation, his dies, tools, materials and equipment used by defendant in the manufacture of said squeegees, and gave to plaintiff his customer list and thereafter retired from the business of manufacturing and selling squeegees.

## XI.

That defendant never used the trade-name "Steccone," enclosed in an oval or in any form, on squeegees, or in any trade-name or trade-mark sense, or prior to its use as a trade-name by plaintiff, prior to the license agreements with plaintiff.

## XII.

That defendant, prior to the license agreements with plaintiff, had marked and sold his squeegees under the trade-name "New Deal."

## XIII.

That plaintiff, since the early part of 1939, applied its trade-name "Steccone" enclosed by an oval to squeegee handles and squeegee rubbers, and manufactured and continuously sold said squeegees so marked in interstate commerce over the entire United States.

## XIV.

That shortly after the execution of the license agreements between plaintiff and defendant said Letters Patent No. 2,123,638 were infringed, and suit was brought against said infringer in the name of plaintiff; and on October 31, 1940, the Circuit Court of Appeals for the Seventh Circuit, in the case of *Morse-Starrett Products Co. et al., vs. Standard American Window Safety Co. et al.*, 115 F. (2d) 574, held said patent invalid for lack of novelty and for anticipation.

## XV.

That on November 13, 1940, plaintiff, pursuant to the terms of the license agreements with defendant, cancelled its license and defendant made no objection to said cancellation.

## XVI.

That after the cancellation of said license agreements on November 13, 1940, plaintiff continued its

manufacture and sale of said squeegees under the trade-name "Steccone" without objection from defendant until October 16, 1942, when defendant caused a letter to be sent to plaintiff objecting to plaintiff's use of the trade-name "Steccone" on said squeegees.

#### XVII.

That plaintiff advised defendant that it would not cease its use of its trade-name "Steccone" for squeegees, and thereafter continued its manufacture and sale of squeegees under the trade-name "Steccone" enclosed by an oval.

#### XVIII.

That subsequent to the letter of October 16, 1942, defendant did nothing in the way of affirmative action until his cross-complaint was filed in May, 1947.

#### XIX.

That defendant excuses the seven-year delay in taking any affirmative legal action on two grounds: (1) he didn't even write a protest letter until October, 1942, because he thought it fair to let plaintiff get rid of its stock on hand; and (2) that from 1942 until 1945, because of the war effort, there was no rubber available satisfactory to him, so he made no attempt to go into the business of manufacturing these particular squeegees. No explanation is given for the delay between 1945 and 1947 except the fact that Goodrich, in compliance with plaintiff's demands, refused to make and mark the rubbers defendant desired.

## XX.

That in 1945 defendant again embarked in the manufacture and sale of squeegees and sold them under the trade-name "Steccone."

## XXI.

That defendant attempted to have his squeegee rubbers for the squeegees he manufactured in 1945 marked with the trade-name "Steccone," and plaintiff notified the manufacturers of said rubbers that they were the owners of Certificate of Registration No. 371,776 of the trade-mark "Steccone" for squeegees and requested said manufacturers to respect plaintiff's rights thereto.

## XXII.

That plaintiff notified a direct mail advertiser, who was advertising defendant's squeegees under the trade-name "Steccone," that it owned United States Certificate of Registration No. 371,776, and requested said advertiser to respect plaintiff's rights thereto.

## XXIII.

That plaintiff expended considerable sums of money in making, selling and advertising its "Steccone" squeegees.

## XXIV.

That plaintiff's "Steccone" squeegee and the trade-name "Steccone" enclosed by an oval have been very widely advertised and promoted by plaintiff throughout the United States from the year 1939 to the present, and such advertising and pro-



motion cost in excess of Eighteen Thousand Dollars (\$18,000.00).

### XXV.

That plaintiff has developed a nationwide market for its squeegees under the trade-name "Steccone" and has developed a considerable and valuable goodwill in the business of manufacturing and selling squeegees under said trade-name.

### XXVI.

That plaintiff is the owner of all of the right, title and interest in and to the trade-name "Steccone" enclosed by an oval and that plaintiff registered the trade-name "Steccone" enclosed by an oval for squeegees in the United States Patent Office, said registrations being No. 371,776, dated October 3, 1939, issued pursuant to the provisions of the Trade-Mark Act of February 20, 1905, and No. 502,662, dated October 5, 1948, issued pursuant to the provisions of the Trade-Mark Act of July 5, 1946.

### XXVII.

That plaintiff's trade-name "Steccone" has acquired a secondary meaning in the trade identifying squeegees manufactured and sold by plaintiff and plaintiff's alone.

### XXVIII.

That from February, 1939, to March 31, 1949, the sales of plaintiff in its said squeegees trade-named "Steccone" amounted to in excess of Two Hundred Fifty Thousand Dollars (\$250,000.00).

## XXIX.

That the plaintiff is the prior user of its trade-name "Steccone" as far as this defendant is concerned.

## XXX.

That the trade-name "Steccone" as used by plaintiff identifies the product in the mind of the public as that of this particular plaintiff.

## XXXI.

That the use of the trade-name "Steccone," by defendant, has caused confusion in the trade, and there is great likelihood that defendant's product will be passed off as that of plaintiff.

## XXXII.

That the use of the trade-name "Steccone" by defendant will deceive buyers into believing defendant's goods are the goods of plaintiff and had their origin with defendant.

## XXXIII.

That the notices sent by plaintiff to rubber manufacturers were sent in good faith and for the purpose of properly notifying said rubber manufacturers of plaintiff's ownership in and to the trade-name "Steccone."

## XXXIV.

That plaintiff's notification of a direct mail advertiser employed by defendant advising said advertiser of plaintiff's right in and to the trade-name "Steccone" was done in good faith and for

the purpose of properly notifying said advertiser of plaintiff's ownership in and to the trade-name "Steccone."

### XXXV.

That the reports made to defendant by plaintiff pursuant to said license agreements were true and accurate reports and were not falsely or fraudulently made by plaintiff to defendant and did not fraudulently conceal the true extent of plaintiff's sales of squeegees under the license agreements between plaintiff and defendant.

### XXXVI.

That the evidence establishes that plaintiff did not unfairly compete with or infringe upon any rights of defendant.

## Conclusions of Law

### I.

That plaintiff is the owner of the trade-name "Steccone" enclosed by an oval as applied to squeegees and squeegee rubbers and is entitled to the exclusive use thereof as against this defendant.

### II.

That as between the parties to this action the plaintiff is the owner of Trade-Mark Registration No. 371,776, dated October 3, 1939.

### III.

That as between the parties to this action the plaintiff is the owner of Trade-Mark Registration No. 502,662, dated October 5, 1948.

## IV.

That this Court has jurisdiction of this cause.

## V.

That plaintiff's trade-name "Steccone" has acquired a secondary meaning in the trade identifying squeegees manufactured and sold by plaintiff as the products of plaintiff.

## VI.

That the defendant, by manufacturing, advertising and selling his squeegees under the trade-name "Steccone," has unfairly competed with the plaintiff.

## VII.

That the defendant, by using the trade-name "Steccone" on squeegees, is likely to cause confusion in the trade between plaintiff's squeegees and defendant's squeegees.

## VIII.

That plaintiff is entitled to a judgment against defendant awarding plaintiff an injunction to be issued out of and under the seal of this Court enjoining defendant from using the trade-name "Steccone" on all squeegees, or the handles thereof, made and sold by him, and from so using his name that reasonably attentive purchasers cannot readily distinguish between the products of plaintiff and defendant, provided, however, that defendant may make, advertise and sell squeegees as the product of the Steccone Products Co., or his product, so long as the name "Steccone," used alone or in con-

junction with other words or symbols, on the squeegees or in the written advertising thereof, is accompanied by sufficient explanatory material so as to clearly differentiate it from the product manufactured and sold by plaintiff.

### IX.

That the notices sent by plaintiff to rubber manufacturers, from whom defendant was purchasing rubbers, were sent in good faith and were lawfully sent by plaintiff to protect its rights.

### X.

That plaintiff's notification of a direct mail advertiser employed by defendant advising said advertiser of plaintiff's right in and to the trade-name "Steccone" enclosed by an oval was done in good faith and for the purpose of properly notifying said advertiser of plaintiff's ownership in and to the trade-name "Steccone" enclosed by an oval.

### XI.

That the plaintiff has not unfairly competed with the defendant.

### XII.

That the plaintiff has not infringed upon any trade-mark or other rights of defendant.

### XIII.

That plaintiff waives its claim for damages against defendant.



## XIV.

That defendant proved no damages against plaintiff.

## XV.

That plaintiff is entitled to a judgment against defendant for its costs of suit.

## XVI.

That plaintiff is entitled to a judgment dismissing the cross-complaint herein.

Dated: January 11, 1950.

/s/ HUBERT W. ERSKINE,  
United States District Judge.

[Endorsed]: Filed January 11, 1950.

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In the District Court of the United States for the  
Northern District of California, Southern  
Division

No. 27081-E

MORSE-STARRETT PRODUCTS CO., a Corporation,

Plaintiff,

vs.

ETTORE G. STECCONE, an Individual, Doing  
Business Under the Firm Name and Style of  
STECCONE PRODUCTS CO.,

Defendant.

## JUDGMENT

This cause having come on to be heard upon the  
issues raised by the Complaint, Answer and Cross-

Complaint, and Answer to Cross-Complaint, and the Court having filed its Findings of Fact and Conclusions of Law, it is Ordered, Adjudged and Decreed:

I.

That plaintiff Morse-Starrett Products Co. is a corporation duly organized and existing under and by virtue of the laws of the State of California, and has a place of business in the City of Oakland, County of Alameda, State of California.

II.

That defendant, Ettore G. Steccone, is an individual and a resident of the City of Oakland, County of Alameda, State of California.

III.

That this Court has jurisdiction of this cause and of the parties.

IV.

That plaintiff is the owner of the trade-name "Steccone" enclosed by an oval and is entitled to the exclusive use thereof for squeegees as between the parties to this action.

V.

That as between the parties to this action, the plaintiff is the owner of the legal title to United States Trade-Mark Registration Nos. 371,776, dated October 3, 1949, and 502,662, dated October 5, 1948.

VI.

That plaintiff's trade-name "Steccone" has ac-

quired a secondary meaning as solely identifying the products of plaintiff and plaintiff's products alone.

#### VII.

That defendant has unfairly competed with plaintiff.

#### VIII.

That plaintiff has not unfairly competed with defendant.

#### IX.

That plaintiff has not infringed upon any trademark rights of defendant.

#### X.

That defendant proved no damages against plaintiff.

#### XI.

That the cross-complaint herein be and the same is hereby dismissed.

#### XII.

That plaintiff waived its claim for damages against defendant.

#### XIII.

That a writ of injunction issue out of and under the seal of this Court enjoining and restraining the defendant, his associates, attorneys, employees, servants, agents, and those in privity with him, or them, from in any manner using the trade-name "Steccone" enclosed by an oval in connection with squeegees, or the handles thereof, and from so using the name "Steccone" that reasonably attentive purchasers cannot readily distinguish between the prod-

ucts of plaintiff and defendant, provided, however, that defendant may make, advertise and sell squeegees as the products of the Steccone Products Co., or as defendant's product, so long as the name "Steccone," used alone or in conjunction with other words or symbols, on the squeegees or in the written advertising thereof, is accompanied by sufficient explanatory material so as to clearly differentiate it from the product manufactured and sold by plaintiff.

#### XIV.

That plaintiff recover from defendant its costs and disbursements in this suit in the sum of \$. . . . . and have execution therefor.

Dated: January 11th, 1950.

/s/ HERBERT W. ERSKINE,  
United States District Judge.

[Endorsed]: Filed Jan. 11, 1950.

---

[Title of District Court and Cause.]

#### PETITION FOR ORDER TO SHOW CAUSE

To the Honorable Judge Erskine of the District Court of the United States for the Northern District of California, Southern Division:

Morse-Starrett Products Co., your petitioner, respectfully shows:

## I.

Petitioner is the plaintiff in the above-entitled action.

## II.

That on or about October 25, 1949, this Honorable Court rendered an opinion in the above-entitled action; said opinion having been entered as an Order in these proceedings by the Clerk of this Court on the 25th day of October, 1949.

That a copy of said opinion and Order was received by mail by the attorney for defendant on or about October 26, 1949; that said opinion and Order contains the following provisions:

That in marking and selling squeegees under the trade-mark "Steccone" defendant is guilty of unfair competition.

That plaintiff is entitled to relief from and protection against such unfair competition.

That defendant should be enjoined from using the trade-mark "Steccone" on all squeegees, or the handles thereof, made and sold by him; and from so using his name that reasonably attentive purchasers cannot readily distinguish between the products of plaintiff and defendant; provided, however, that he may make, advertise, and sell squeegees as the product of the Steccone Products Company, or as his product so long as the name "Steccone," used alone or in conjunction with other words or symbols, on the squeegees or in the written advertising thereof, is accompanied by sufficient explanatory material



so as to clearly differentiate it from the product manufactured and sold by plaintiff.

*J. F. Rowley Co. v. Rowley,*

18 F. (2d) 700;

*Chickering v. Chickering & Sons,*

215 Fed. 490;

*Bates Mfg. Co. v. Bates Numbering Mach. Co.,*

172 Fed. 892;

*J. A. Dougherty's Sons v. Dougherty,*

36 F. Supp. 149;

*Dodge Stationery Co. v. Dodge,*

145 Cal. 380.

### III.

That there is published monthly and circulated throughout the window cleaning and maintenance industry a national magazine for window cleaning and maintenance companies entitled "The Window Cleaner."

That the December issue of said magazine was received by petitioner on or about December 27, 1949, and the same contained an advertising insert, a copy of which is attached hereto, made a part hereof, and marked Exhibit 1.

That petitioner is informed and believes and on information and belief alleges that Sterling Sanitary Supply Corporation is a distributor and agent of defendant and that the material for making up said insert was furnished to said Sterling Sanitary Supply Corporation by defendant herein subsequent to the entry and issuance of this Court's said order.

That the use of the trade-mark "Steccone" identifying the squeegees advertised by said insert as

“Steccone’s Master Squeegee” is in violation of this Court’s Order.

That the statement:

“Be sure you buy the Genuine Steccone’s Master Squeegee manufactured by the inventor and originator of the Steccone Squeegee. Be sure to ask for Steccone Master. Beware of imitations bearing our name.”

is improper and in violation of this Court’s Order.

That the statement:

“Ettore Steccone, the originator of the Steccone Squeegee and owner of the Steccone Products Co., has had no connection for more than six years with the firm that arbitrarily uses the name Steccone.”

is improper and in violation of this Court’s Order of October 25, 1949.

That the publication or authorizing for publication by defendant, through defendant’s agent, Sterling Sanitary Supply Corporation, of said insert, Exhibit 1, is in direct violation of this Court’s Order of October 25, 1949.

#### IV.

That a judgment was entered herein on January 11, 1950, and, among other things, provided that a writ of injunction issue out of and under the seal of this Court enjoining and restraining the defendant, his associates, attorneys, employees, servants, agents, and those in privity with him, or them, from in any manner using the trade-name “Steccone” enclosed by an oval in connection with squeegees

or the handles thereof, and from so using the name "Steccone" that reasonably attentive purchasers cannot readily distinguish between the products of plaintiff and defendant, provided, however, that defendant may make, advertise and sell squeegees as the products of the Steccone Products Co., or as defendant's products, so long as the name "Steccone," used alone or in conjunction with other words or symbols, on the squeegees or in the written advertising thereof, is accompanied by sufficient explanatory material so as to clearly differentiate it from the product manufactured and sold by plaintiff.

#### V.

That thereafter and on or about April 11, 1950, defendant caused to be published and circulated among the window cleaning industry of the United States an advertising pamphlet, copy of which is attached hereto, made a part hereof and marked Exhibit 2.

#### VI.

That said advertising circular, Exhibit 2, employs the names "Steccone" and "Steccone Products Co." unaccompanied with any explanatory material so as to clearly distinguish the products there advertised from the products manufactured and sold by plaintiff, all in violation of this Court's judgment.

#### VII.

That there appears on the inside of said pamphlet in fine print the following:

“Ettore Steccone, who was granted Patent No. 2,123,638\* on July 12, 1938, for a squeegee, has no connection with Morse-Starrett Products Co., which was once licensed under this patent, but has canceled its license and continues to sell squeegees marked: Steccone.”

---

\*Held invalid in *Morse-Starrett Products Co. v. Standard American Window Safety Device Co.* 115 F. (2d) 574.

### VIII.

That said legend embodies an improper use of plaintiff's trade-mark “Steccone” and infers that plaintiff has no right to manufacture and sell squeegees under its trade-mark “Steccone.” That by the use of said legend on said Exhibit 2 defendant has violated the judgment of this Court and is guilty of trade-mark infringement and unfair competition as against plaintiff herein.

### IX.

That defendant also on or about April 11, 1950, caused to be published and circulated among the window cleaning industry of the United States an advertising circular, copy of which is attached hereto, made a part hereof and marked Exhibit 3.

### X.

That said advertising circular, Exhibit 3, employs the names “Steccone” and “Steccone Products Co.” unaccompanied with any explanatory material so as to clearly distinguish the products there adver-



tised from the products manufactured and sold by plaintiff, all in violation of this Court's judgment.

### XI.

That there appears on said circular, Exhibit 3, in fine print the following legend:

"Ettore Steccone, who was granted Patent No. 2,123,638\* on July 12, 1938, for a squeegee, has no connection with Morse-Starrett Products Co., which was once licensed under this patent, but has canceled its license and continues to sell squeegees marked: Steccone."

---

\*Held invalid in *Morse-Starrett Products Co. v. Standard American Window Safety Device Co.* 115 F. (2d) 574.

### XII.

That said legend embodies an improper use of plaintiff's trade-mark "Steccone" and infers that plaintiff has no right to manufacture and sell squeegees under its trade-mark "Steccone." That by the use of said legend on said Exhibit 3 defendant has violated the judgment of this Court and is guilty of trade-mark infringement and unfair competition as against plaintiff herein.

### XIII.

That defendant also on or about April 11, 1950, caused to be published and circulated among the window cleaning industry of the United States an advertising circular, copy of which is attached hereto, made a part hereof and marked Exhibit 4.



## XIV.

That said advertising circular, Exhibit 4, employs the name "Steccone Products Co." unaccompanied with any explanatory material so as to clearly distinguish the products there advertised from the products manufactured and sold by plaintiff, all in violation of this Court's judgment.

## XV.

That the said trade publication, "The Window Cleaner" for March-April, 1950, copy of which is attached hereto, made a part hereof and marked Exhibit 5, includes advertising by defendant's distributor and agent, Sterling Sanitary Supply Corporation.

That upon information and belief the petitioner is informed and believes that the material for making up said advertisement was furnished to said Sterling Sanitary Supply Corporation by defendant herein subsequent to the entry of said judgment.

That the said advertisement includes the trademark "Steccone's Master Squeegee" and that there is no explanation made in said advertisement so that reasonable attentive purchasers could distinguish between the products of defendant sold by its distributor and agent, Sterling Sanitary Supply Corporation, and the products of the plaintiff herein, all in violation of this Court's judgment.

## XVI.

That two other advertisements appear in said trade publication, "The Window Cleaner" adver-

tising the sale of genuine "Steccone" rubbers; one on behalf of Formula Products, Inc., 103 Elizabeth Avenue, Newark, N. J., and another on behalf of Pearl Bros., 600 Capouse Avenue, Scranton, Penna.

That plaintiff is informed and believes and on said information and belief alleges that said advertisements refer to defendant's products.

### XVII.

That said advertising circulars, Exhibits 2 and 3, disclose the identical use of the name "Steccone" on defendant's squeegee handle which was originally charged in the complaint to constitute unfair competition by the defendant and which this Court held to be unfair competition in its opinion and judgment. That the said continued use of the name "Steccone" by defendant on his squeegee handles is in violation of this Court's judgment and constitutes unfair competition by defendant against plaintiff.

### XVIII.

That said acts of defendant have caused and will continue to cause great and irreparable injury and damage to plaintiff.

Wherefore, petitioner prays:

1. That defendant be required to show cause why he should not be attached for contempt and adjudged by this Court to be in contempt of its Order and judgment in this cause and be punished for the same.

2. That defendant be ordered to deliver up to

this Court for destruction all advertising inserts, the same as or similar to Exhibits 1, 2, 3, 4 and 5, attached hereto, and all plates or other material for making same now in defendant's possession or under his control or in the possession of or under the control of defendant's distributors and agents.

3. That this Court enter a further order enjoining defendant from use of the name "Steccone" in any manner whatever in connection with squeegees and parts therefor.

4. That this Court direct the defendant to instruct, in writing, his agents and distributors from in any manner using the name "Steccone" in connection with the advertisements and sales of squeegees and parts therefor.

5. That defendant be required to pay punitive damages to plaintiff in the amount of One Thousand Dollars (\$1,000.00), reasonable attorneys' fees in the amount of Five Hundred Dollars (\$500.00) and such other and further relief as the nature of this case may require.

MORSE-STARRETT  
PRODUCTS CO.,

By /s/ LEON J. PAUL,  
President.

State of California,  
County of Alameda—ss.

Leon Paul, being duly sworn, deposes and says:  
That he is President of Morse-Starrett Products

Co., petitioner named in the foregoing petition, and that he has read the contents thereof and that the statements therein contained are true and correct except such matters as are therein stated on information and belief and as to such matters he believes them to be true.

/s/ LEON PAUL.

Subscribed and sworn to before me this 19th day of July, 1950.

[Seal]      /s/ E. A. WARNESS,  
Notary Public.

My commission expires May 13, 1953.





# STECCONE'S MASTER SQUEEGEE

*New*

## FOR PROFESSIONAL WINDOW CLEANERS

- Designed especially to do high quality work with speed and economy. A fine high quality tool made of special tempered brass that will stand hard usage and last for years.

1 The rubber is inserted in the handle—no pushing—no pulling



2 Then brass clip is slipped on into position and it takes but a second.



3 Then rubber and brass clip are pushed into the channel. The rubber is held in positive position, cannot slip, and the rubber wears longer and performs better.



STECCONE'S MASTER SQUEEGEE is made with a replaceable rubber held in place by a patented brass clip.

The finest and most complete squeegee ever offered to the trade.

**THERE IS NO ECONOMICAL SUBSTITUTE FOR QUALITY**

COMPLETE  
PER DOZ  
WITH CLIPS

CHANNEL WITH  
RUBBER AND CLIP

RUBBERS  
PER GROSS

FREIGHT PREPAID ON  
100 LB SHIPMENTS

Sizes	18"	\$18.00	\$10.00	\$23.00
	16"	17.00	9.00	22.00
	14"	16.50	8.50	20.00
	12"	16.00	8.00	19.00
	10"	15.50	7.50	17.00
	8"	14.50	6.50	16.00
	6"	14.00	6.00	14.00

**BRASS HANDLES WITH LOCK RING \$9.00 per dozen.**

JOBBERS WHITE  
FOR SPECIAL  
DISCOUNT  
IN LARGER  
QUANTITIES

Be sure you buy the GENUINE STECCONE'S MASTER SQUEEGEE manufactured by the inventor and originator of the Steccone Squeegee. Be sure to ask for Steccone Master. Beware of imitations bearing our name.

Elmer Steccone, the originator of the Steccone Squeegee and owner of the Steccone Products Co., has had no connection for more than six years with the firm that originally uses the name Steccone.

Manufactured by  
**STECCONE PRODUCTS CO.**

**SOLD BY**  
**STERLING SANITARY SUPPLY CORP.**

28 WEST HOUSTON STREET  
NEW YORK 12, N. Y.



DETACH THE REPLY CARD  
AND MAIL YOUR ORDER TODAY

*You'll Never Want Any  
Substitutes!*

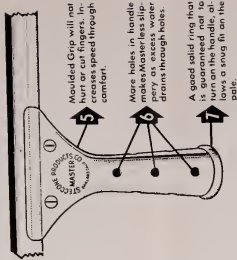
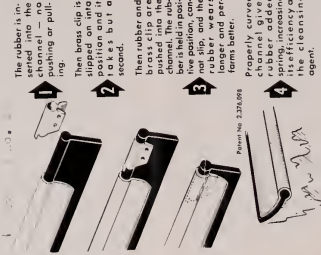
MELLIN AND HANBOM  
8TH FLOOR, 361 BUTTER ST.  
SAN FRANCISCO 8  
DUPLICATE BUTTER

EXHIBIT 1

1  
2  
3  
4  
5

# ETTORE STECCONE MASTER SQUEEGEE

ONLY THE MASTER HAS THE FOLLOWING ADVANTAGES AT NO EXTRA COST



Designed to do quality work with speed and economy. Made of special tempered brass that will stand hard usage and last for years

ETTORE STECCONE, who was granted Patent No. 2,173,638 on July 12, 1938 for a squeegee which has no connection with Morse-Sorrenti's design, has once again licensed an- other party to make and sell squeegees which are identical to his own, but has cancelled its license and continues to sell squeegees marked: (S) (S) (S)

\*Held invalid in Morse-Sorrenti Products Co. v. Standard American Window Sashery Device Co., 115 F.2d 574

DOES A BETTER JOB, FASTER AND EASIER

25  
26  
27  
28  
29  
30

All features designed into the MASTER SQUEEGEE are aimed at greater efficiency and speed, providing higher wages with shorter hours.

There is no economical substitute for quality.

# ETTORE STECCONE MASTER SQUEEGEE

FOR PROFESSIONAL WINDOW CLEANERS

The rubber is inserted in the channel — no pushing — no pulling.

Then brass clip is slipped on into position and it takes but a second.

Then rubber and brass clip are pushed into the channel. The rubber is held in positive position, cannot slip, and the rubber wears longer and performs better.



Patent No. 2,376,998

• Designed especially to do high quality work with speed and economy. A fine high quality tool made of special tempered brass that will stand hard usage and last for years.

The MASTER SQUEEGEE is made with a replaceable rubber held in place by a patented brass clip.

The finest and most complete squeegee ever offered to the trade.

**THERE IS NO ECONOMICAL SUBSTITUTE FOR QUALITY**

## LIST PRICE — MARCH 1, 1950 — MASTER WINDOW SQUEEGEES

Size	Complete Per Doz.	Channel—with Rubber—Per Doz.	Rubbers* Per Doz.	Shipping Wgt. Per Doz.	100-LB. SHIPMENTS
18"	\$23.00	\$12.50	\$3.20	7½ lbs.	<b>Freight prepaid on 100 lb. shipments.</b>
16"	22.50	12.00	3.00	7 lbs.	
14"	21.50	11.00	2.70	6½ lbs.	No freight allowed on shipments of less than 100 lbs.
12"	20.50	10.00	2.50	6 lbs.	
10"	19.50	9.00	2.20	5½ lbs.	<b>ALL PRICES</b>
8"	18.50	8.00	2.00	5 lbs.	f.o.b. Oakland, California
6"	17.50	7.00	1.70	4½ lbs.	

**BRASS HANDLES WITH LOCK RING \$10.50 per dozen.**

**SQUEEGES PACKED IN INDIVIDUAL CARTONS, \$.60 NET extra per dozen.**

\*Rubbers also available in 36" lengths. Shipping weight on 18" Rubbers ONLY 11 lbs. per gross.

*When Better Squeegees are made  
Ettore Steccone will make them*

For today's need is greater efficiency and speed to provide higher wages with shorter hours.

Ettore Steccone, who was granted Patent No. 2,372,638\* in July 12, 1938 for a squeegee, has no connection with Morris-Storrett Products Co., which was once licensed under this patent. Both have continued to improve and continue to sell squeegees marked **ETTORE**.



\*Held invalid in Morris-Storrett Products Co. v. Steccone through Supreme Court Decree No. 115 p. 120, 374

Manufactured by

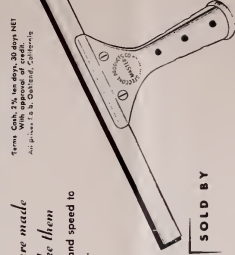
**STECONE PRODUCTS CO.**

2827 32nd Ave., Oakland 6, Calif.

Telephone KEllog 2-5420

**SOLD BY**

Terms: Cash, 3% less days, 30 days NET  
With approval of credit.  
All prices f.o.b. Oakland, California



WHEN ORDERING BE SURE TO SPECIFY WHAT KIND YOU WANT

# STECONE PRODUCTS CO.

2827 TWENTY-THIRD AVENUE • OAKLAND 6, CALIFORNIA  
Telephone KEllog 2-5629

Manufacturers

## ETTORE STECCONE WINDOW SQUEEGEES

E. P. GILSDORF & CO.  
REPRESENTATIVE  
2015 17th ST. - SAN FRANCISCO, CALIF.  
YUkon 2-3847

### Dealers' Discount Information

#### SQUEEGEES COMPLETE

FREIGHT PREPAID ON 100 LBS. OR  
MORE . . . NO FREIGHT ALLOWED  
ON SHIPMENTS LESS THAN 100 LBS.

QUANTITY	DISCOUNT
Under 1 Gross . . . . .	50%
1 to 3 Gross . . . . .	50%
3 to 5 Gross . . . . .	50%
Over 5 Gross . . . . .	50%

Sizes may be assorted

#### REPLACEMENT RUBBERS

Under 2 Gross . . . . .	50%
2 to 4 Gross (Freight Prepaid) . . . . .	50%
4 to 8 Gross (Freight Prepaid) . . . . .	50%
8 to 16 Gross (Freight Prepaid) . . . . .	50%
Over 16 Gross (Freight Prepaid) . . . . .	50%

All discounts apply to single orders and shipments of the specified quantities for the account of the jobber. Discounts are applicable against published current list prices, F.O.B. factory, Oakland, California.



*When better squeegees are  
made Ettore Steccone  
will make them.*

**DISPLAY RACK**  
**Price \$1.25 net**

Free with order for 6 dozen  
or more squeegees.

# WINDOW CLEANER

A monthly publication and trade magazine for the window cleaning & maintenance industry circulating throughout the U. S. and Canada.

Printed in the U.S.A.

Published by the Whitegate Printing Company

Circulation Office: 855 Avenue of the Americas, New York 1 N. Y.  
Tel. No. CH 4-1713

Editors—WM. OFFENBERG — EDWARD A. FALASCA

Associate Editor—N. H. LORDE

Circulation Manager—FRANCES HIRSCHBERG

Subscription rates \$3.00 per year effective February 1st, 1950.

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- 1—1950 Excellent Building Year
- 1—What's New
- 1—The Meeting Place
- 1—Something to Laugh About

## Steccone's Master Squeegee

For Professional Window Cleaners!

THE FINEST, MOST COMPLETE SQUEEGEE  
EVER OFFERED TO THE TRADE!

Sold By

**RLING SANITARY SUPPLY CORP.**

28 WEST HOUSTON STREET

NEW YORK 12, N. Y.

## NO ADVERTISING

**SELLS Like**

**ADVERTISING**

**in your TRADE MAGAZINE**

Meet the Man You Want Your Advertising to Sell!

Write "THE WINDOW CLEANER" for rates and specifications!

### NOTHING TO JOKE ABOUT!

On February 15th in Oklahoma City, Oklahoma, window washer Ernest Whaley, aged 53, plunged to his death. He was on the job on the seventh floor of the Huckins Hotel when the accident occurred. The newspaper report in which this tragic item first appeared, noted that Mr. Whaley had often joked about wearing a safety belt on the job. The item concluded rather flippantly, "He apparently forgot to fasten his safety belt."

We sincerely regret the loss of Mr. Whaley to our industry. The entire affair is too serious to simply dismiss with a cold report of the facts, however. We, who are devoted to the window cleaning industry, feel bound to all a note of caution to our readers—CHECK YOUR EQUIPMENT EVERYTIME YOU step out on that window ledge! And it's *never* something to joke about.

## FORMULA PRODUCTS INC.

103 Elizabeth Avenue • Newark, N. J.

*Buy With Confidence*

FULL SKINS: 36 x 30 CHAMOIS  
Kep. \$79.00 Doz. \$34.50 Each \$2.95

Sponges  
Mediterranean 8 to 10 Forms \$1.50 Each  
Rock Island 6 to 8 Forms 2.45 Each

5% less in dozen lots

### BRISTLE BRUSHES

Genuine China Bristle, Chicago Block.

8" \$6.95 10" \$7.95 12" \$8.95 14" \$9.95

5% less in dozen lots

GENUINE STECCONE RUBBERS 18" \$22.50 per Gross

## "CHABCO"

THE WAR IS OVER!

But The Brush Trouble Lingers On. Use The

NEW "CHABCO" BRUSH



Lighter, Safer, 100% Pure Bristle. Features Detachable Handle Which Can Be Removed in a Jiffy When Not Needed for Stick Work.

WEIGHS HALF OF REGULAR  
BRUSHES IN USE.

Join The Thousands in Repeat Orders

12" Brush—\$11.00 with attachment.

10" Brush—\$10.00 with attachment.

Correct Handle & Brush Co.

120 Greenwich Street New York City

RECTOR 2-0625





THE MEETING PLACE

ACKER & MANN, Inc.

Safety Belts Sold and Repaired  
 Safety Anchors Sold and Installed

1922 W Atkns 9-7967  
 120 WEST 18TH STREET  
 NEW YORK 11, N. Y.

HAAG LABORATORIES  
 Inc.

Manufacturers of:  
 Soap and Sanitary Chemical Products  
 For the Wholesaler  
 1000 STREET AND SEELEY AVENUE  
 P. O. Box No. 114  
 ISLAND ILLINOIS

JOSEPH E. FRANKLE CO.

Manufacturers' — Jobbers' — Importers'  
 BRUSHES  
 for Every Industrial Use  
 1336 RISING SUN AVENUE  
 Philadelphia 40, Pa.

ACME WINDOW CLEANING  
 Co.

Cleaning Windows in:  
 Stores, Offices, Private Dwellings, Hotels,  
 Restaurants and Cafeterias  
 Special Rates by the Month  
 1228 CHESTNUT AVENUE  
 BRidgeport 2163 Minneapolis, Minn.

FRANK A. SCHILLER

SCHILLER'S WINDOW CLEANING  
 3332 HOLLAND STREET  
 ERIE, PA.

DAYCON PRODUCTS

Management of Mr. David Cohen

1009 - 9TH STREET, N. W.  
 WASHINGTON, D. C.

AETNA WINDOW CLEANING  
 Co.

"Let Us Do Your Janitor Work"  
 Reliable Crew of Men and Women  
 Prepared to Do Any Kind of Cleaning  
 Main 0281 1019 MAIN ST.

BUSINESS OPPORTUNITIES!

re's ideal spot to sell, purchase, or  
 business set-ups, or used equipment.  
 are 10c per word (or \$1.00 a line)

with one-line minimum charge. Repeat  
 ads are 75c per line. Address all ads and  
 inquiries to Editor, THE WINDOW  
 CLEANER, 835 Sixth Avenue, N. Y. 1.

FOR SALE!

Window Cleaning Business and  
 10-Room Furnished House for Sale  
 —good condition. Window Clean-  
 ing, Transportation, all equipment  
 very best. \$18,000 last year. Will  
 sell for \$20,000. If interested call  
 Temple 2-7472, or write Boulevard  
 Window Cleaning Co., 1103 Mer-  
 rick, Detroit, Mich.

FLOOR WAXES

AT THEIR BEST!

Non-Slip!

Heavy Duty!

EXTREMELY HIGH LUSTRE

Low in Price

TIDE WAX COMPANY

Specialist in Floor Waxes Since 1935

McHenry

Illinois

[ENDORSED]: FILED JULY 29, 1950.

**MURDER!**  
**CASH SALE**  
**5 DAYS Only 5**

**GIANT**  
**ENGLISH CHAMOIS**  
**6 for \$20.00**

\$95.00 a KIP  
 EVERY Skin Over 3 Feet Long!

**MEDIUM**  
**ENGLISH CHAMOIS**  
**6 for \$17.00**

\$79.00 a KIP

**Wall-Washing Sponges**

25 for \$49.00

Genuine Steccone Rubber  
 20.00 Gross — \$2.00 Dozen

Genuine Steccone Squeegies  
 (Complete with Handle & Rubber)  
 \$12.00 a Dozen

**PEARL BROS.**

Importers — Chamois & Sponges  
 600 Capouse Avenue  
 Scranton 9, Penna.  
 Phones — 2-6045 7-3309

Check or Money Order Should  
 Accompany All Orders

America's Fastest-Growing  
 Window Cleaners' Supply Depot!



[Title of District Court and Cause.]

AFFIDAVIT OF LEON PAUL

State of California,  
County of Alameda—ss.

Leon Paul, being duly sworn, deposes and says:

That he is of legal age and that he is President for petitioner herein, Morse-Starrett Products Co.

That this Court, after a full trial on the merits, rendered an opinion in this cause dated October 25, 1949, and a judgment dated January 11, 1950. The opinion was filed and entered in this proceeding on October 25, 1949, and the judgment was filed and entered herein on January 11, 1950.

That petitioner herein, Morse-Starrett Products Co., received a copy of the December issue of the magazine entitled "The Window Cleaner" in the regular course of business and that said publication is circulated generally throughout the window cleaning industry.

That said magazine contained therein an advertising insert advertising the sale by Sterling Sanitary Supply Corporation of Steccone's Master Squeegee.

That said advertising insert is attached to the petition for an Order to show cause for contempt as Exhibit 1, which is filed herewith.

That affiant is informed and believes and therefore states that Sterling Sanitary Supply Corporation is an agent of the defendant herein; and that affiant is informed and believes and therefore states that the publication of said advertising insert was

at the direction of defendant herein; and that the cuts and material for the makeup of said advertising insert was supplied to said Sterling Sanitary Supply Corporation by defendant.

That the other advertising circulars, Exhibits 2, 3, 4 and 5, to the Petition for Order to Show Cause, including the March-April, 1950, issue of "The Window Cleaner" were received by petitioner herein in the regular course of business and affiant is informed and believes, and on such information and belief states that said Exhibits 2, 3, 4 and 5 were generally circulated throughout the window cleaning industry.

That the defendant has wholly failed and neglected to observe, comply and carry out the provisions and requirements of this Court's opinion and Order dated October 25, 1949, and this Court's judgment, dated and entered herein January 11, 1950.

That by reason of defendant's refusal to obey said opinion and Order of October 25, 1949, and said Judgment of January 11, 1950, and by the publication or authorizing for publication of the said advertising material, Exhibits 1, 2, 3, 4 and 5, to the Petition for Order to Show Cause, defendant has defeated and impaired the remedy granted to petitioner herein by this Court, and said acts have damaged and will continue to damage, if not prohibited by this Court, the petitioner herein.

Wherefore petitioner prays:

That this Court assess punitive damages against the defendant in the sum of One Thousand Dollars



(\$1,000.00) and order defendant to pay to petitioner reasonable attorneys' fees and costs herein and grant to petitioner the further relief prayed for in petitioner's Petition for Order to Show Cause and such other and further relief as the nature of this case may require.

Affiant states that petitioner has duly authorized its attorneys, Mellin, Hanscom & Hursh, to make this application and take this procedure for and on its behalf to punish the defendant for his wrongful neglect and refusal to comply with and obey the opinion and Order of this Court dated October 25, 1949, and the Judgment of this Court dated January 11, 1950.

Wherefore affiant demands:

That the defendant herein be punished for contempt of Court for his neglect and refusal to comply with and obey the Opinion and Order and Judgment entered herein as aforesaid, and that he be required to show cause before this Court why he should not be so punished.

/s/ LEON PAUL.

Subscribed and sworn to before me this 19th day of July, 1950.

[Seal]      /s/ E. A. WARNESS,  
Notary Public.

My commission expires May 13, 1953.

[Endorsed]: Filed July 20, 1950.

[Title of District Court and Cause.]

### ORDER TO SHOW CAUSE

On the petition of plaintiff and the verification made thereto and the affidavit of Leon Paul, dated July 19, 1950, charging contempt of court against Ettore Steccone, defendant herein.

It Is Hereby Ordered that the said Ettore Steccone be and appear before the Honorable Herbert W. Erskine, District Judge, at the Courthouse, Seventh and Mission Streets, San Francisco, California, on the 26th day of July, 1950, at 10:00 o'clock in the forenoon of that day, to show cause, if any he has, why he should not be punished for contempt of court in publishing advertising in connection with the sale of "Steccone's Master Squeegees" as more fully appears from the petition of plaintiff, and the affidavit of Leon Paul, copies of which are hereby ordered to be served herewith on defendant on or before the 24th day of July, 1950.

/s/ HERBERT W. ERSKINE,  
United States District Judge.

Dated: July 20th, 1950.

[Endorsed]: Filed July 20, 1950.

[Title of District Court and Cause.]

AFFIDAVIT OF E. P. GILSDORF  
ON ORDER TO SHOW CAUSE

State of California

City and County of San Francisco—ss.

E. P. Gilsdorf, being first duly sworn, deposes and says:

1. That he is engaged in the business of selling and distributing janitor's supplies as a manufacturer's representative, under the name and style E. P. Gilsdorf & Co., with a place of business at 246 Ritch Street, San Francisco, California.

2. That since in or about the year 1946 affiant has represented Ettore Steccone, doing business under the name and style "Steccone Products Co.," the defendant herein, in the selling and distributing of his squeegee products, and in so doing affiant employs two (2) salesmen to call on the trade and, in addition, affiant personally calls on the trade in the solicitation of business.

3. That since about the month of February, 1950, affiant in the solicitation of sales of the squeegee products of Ettore Steccone, the defendant herein, has met repeated resistance in the form of statements from customers and prospective customers that they had been informed that "Steccone Products Co." would not be able to employ the name "Steccone" and such customers, and prospective customers, have implied that it was their further

understanding that this Court's ruling made it improbable that "Steccone Products Co." could remain in business for any length of time.

4. That affiant's said salesmen have reported that they too have encountered sales resistance to the squeegee products of "Steccone Products Co." in the form of statements from customers and prospective customers that they (the said customers and prospective customers) have been informed that "Steccone Products Co." would not be able to employ the name "Steccone" and such customers and prospective customers have implied that it was their further understanding that this Court's ruling made it improbable that "Steccone Products Co." could remain in business for any length of time.

5. That the affiant's personal experiences and those of his salesmen, as reported to him, related in Paragraphs 3 and 4 hereof, have occurred in San Francisco, Sacramento, San Jose, Portland, Los Angeles and Seattle.

/s/ E. P. GILSDORF.

Subscribed and sworn to before me this 24th day of July, 1950.

[Seal]     /s/ MAUDE RALPH,  
Notary Public.

My Commission Expires September 17, 1952.

[Endorsed]: Filed July 26, 1950.

[Title of District Court and Cause.]

AFFIDAVIT OF ETTORE G. STECCONE IN  
OPPOSITION TO ORDER TO SHOW  
CAUSE

State of California,  
City and County of San Francisco—ss.

Ettore G. Steccone, being first duly sworn, deposes and says:

1. He has carefully read plaintiff's petition for order to show cause and the affidavit of Leon Paul, served upon him during the afternoon of Thursday, July 20th, 1950, and further affiant states that he has examined the several exhibits annexed to and referred to in said petition.

2. That immediately upon being advised that this Court had handed down its memorandum opinion of October 25th, 1949, affiant requested his counsel, I. M. Peckham, Esq., and Jas. M. Naylor, Esq., to give him an interpretation of the same for his guidance in the future use of affiant's name in the marking of his articles as well as the advertisement thereof.

3. That under date of November 8th, 1949, said Jas. M. Naylor gave affiant a written preliminary memorandum of opinion, of which a copy is annexed hereto and marked Exhibit A.

4. That immediately following communication to affiant of the fact that this Court had on January 11th, 1950, entered its judgment herein, affiant met with his counsel, I. M. Peckham, Esq., and Jas. M.



Naylor, Esq., to seek their further counsel and guidance relative to the things forbidden and the things permitted by the aforesaid judgment.

5. That several conferences were had with affiant's aforesaid counsel, during which affiant submitted his past advertising material and requested the assistance and guidance of counsel in the making of appropriate revisions therein for the sake of compliance with the intent and spirit of this Court's judgment herein.

6. Following such additional conferences with his counsel, affiant received a further memorandum of opinion under date of February 8th, 1950, interpreting the language of the judgment, a copy of which communication is annexed hereto and marked Exhibit B.

7. That under date of February 15th, 1950, affiant directed a further inquiry to his counsel, Jas. M. Naylor, Esq., of Naylor and Lassagne, concerning specific revision of the language employed on one piece of his advertising, and a copy of said communication of February 15th, 1950, is annexed hereto and marked Exhibit C, and a photostatic copy of the advertising piece referred to therein is annexed hereto and marked Exhibit D.

8. That under date of February 20th, 1950, affiant's counsel, Jas. M. Naylor, submitted a written opinion concerning the re-editing of the phrase in question, and a copy of the same is annexed hereto and marked Exhibit E.

9. That with respect to Exhibit 1 annexed to the Petition for Order to Show Cause on file herein, affiant denies that Sterling Sanitary Supply Corporation is either a distributor or an agent for affiant's products, but on the contrary is a mere jobber or dealer purchasing affiant's products in quantities at discount for re-sale.

10. Affiant denies that the material for making up the said insert (Exhibit 1) was furnished to said Sterling Sanitary Supply Corporation by affiant subsequent to the entry and issuance of this Court's Order (for opinion) of October 24th, 1949, and on the contrary asserts that said insert was made up by said Sterling Sanitary Supply Corporation entirely on its own and without assistance from affiant and that said concern employed affiant's price list of October 1st, 1948 in the make-up thereof, as will more particularly appear from a copy annexed hereto as Exhibit F.

11. That with respect to Exhibits 2, 3 and 4 annexed to the Petition for Order to Show Cause on file herein, the said advertising circulars and discount sheet were prepared by and for affiant upon the basis of his understanding of the interpretations of the Court's judgment and order by his counsel, referred to in Paragraphs 2-8 inclusive hereof.

12. That with respect to Exhibit 5 annexed to the Petition for Order to Show Cause, affiant avers again that said Sterling Sanitary Supply Corporation is neither affiant's distributor nor agent, but rather a jobber and dealer in affiant's products; affiant denies that the material for making up said

advertisement was supplied by affiant to said concern at any time and particularly subsequent to the entry of the judgment, and alleges the fact to be that the first knowledge affiant had of the said advertisement or its make-up was acquired on July 20th, 1950, when affiant was served with a copy of the Petition for Order to Show Cause on file herein.

13. That with further respect to Exhibit 5 annexed to the Petition for Order to Show Cause and particularly the advertisement of Formula Products, Inc., appearing therein, affiant alleges that so far as he is aware, and according to his records, he has not sold and does not sell his products to said Formula Products, Inc.; that if the said concern is in fact offering affiant's products for sale, then said products have been purchased from a source other than affiant; affiant alleges upon information and belief that said Formula Products, Inc., is offering for sale and selling the products of plaintiff herein.

14. That with further respect to Exhibit 5 annexed to the Petition for Order to Show Cause and particularly the advertisement of Pearl Bros. appearing therein, affiant alleges that he does not know whether the said advertisement refers to his product or not as affiant has been informed that Pearl Bros. handle both the products of affiant and Morse-Starrett Products Co., plaintiff herein.

15. That since about the month of February, 1950, affiant has received a plurality of verbal reports from those persons concerned with the sale of his products that, in the solicitation of sales of affi-

ant's squeegee products, repeated resistance had been met in the form of statements from customers and prospective customers that they had been informed that "Steccone Products Co." would not be able to employ the name "Steccone" and such customers and prospective customers have implied that it was their further understanding that this Court's ruling made it improbable that "Steccone Products Co." could remain in business for any length of time.

16. That, upon information and belief, affiant avers that the employees and agents of Morse-Starrett Products Co., plaintiff herein, have, since entry of the Court's order of October 25th, 1949, herein, been telling the trade that affiant was enjoined from using his name "Steccone," without explaining that the Court's opinion and judgment did not contain an absolute prohibition against use thereof but was qualified, and coupling with this half-truth implications that this Court's decision in the cause would eventually put affiant out of business, all for the purpose of competing unfairly with affiant and causing him irreparable damage and injury.

/s/ ETTORE G. STECCONE.

Subscribed and sworn to before me this 25th day of July, 1950.

[Seal]      /s/ MAUDE RALPH,  
Notary Public.

My Commission Expires September 17, 1952.



## EXHIBIT A

(Copy)

Naylor and Lassagne

Attorneys at Law

Patent—Trade Mark and Copyright Matters

Russ Building

San Francisco 4, California

November 8, 1949

Mr. Ettore Steccone

Steccone Products Co.

2827 Twenty-third Avenue

Oakland 6, California

Re: Morse-Starrett Products Co.

v. Steccone—No. 27081-H

Dear Mr. Steccone:

The other day you and I. M. Peckham, Esq., came by my office and asked me to review the memorandum opinion of October 25th, 1949, handed down by Judge Herbert W. Erskine, and advise you specifically relative to the uses of the name "Steccone" which are permitted and forbidden, so long as this decision shall stand.

In this connection I have carefully read Judge Erskine's opinion and the five decisions cited on page 20 thereof, as well as check the uses of the name "Steccone" that you have been making, with the following results:

1. It is clear that you should not continue the use of the name "Steccone," or its equivalent "Steccone's," in the manner in which these markings have been employed on your squeegee rubber and in your



advertising. The second item of the Court's conclusions (page 19) treats specifically with the marking and selling of squeegees under the trade mark "Steccone" as unfair competition. There are many cases standing for the proposition that the mere addition of an apostrophe and the letter "s" to a surname will not avoid unfair competition or infringement, and *Dodge Stationery Co. v. Dodge*, 145 Cal. 380, cited at page 20 of the Court's opinion, is typical.

It is, therefore, recommended that the word "Steccone's" be removed from your squeegee rubbers. It is also recommended that you discontinue the use of the word "Steccone's" in your advertising circulars wherever it occurs as a prefix to terms such as "Challenger Squeegee" or "Master Squeegee." This same recommendation goes to all advertising material, such as display cards and the like.

2. We conclude that the marking presently employed on your squeegee handles meets all of the requirements of the Court's decision. We refer specifically to the mark "Master" encircled by the phrase "Steccone Products Co., Oakland, California." Greater prominence is there given to the word "Master" than to the other wording, and we deem this as "sufficient explanatory material so as to clearly differentiate it from the product manufactured and sold by plaintiff."

3. We feel that the trade style "Steccone Products Co." may be used in environments other than the specific marking employed on the handles of

your squeegees, so long as you accompany it by "sufficient explanatory material so as to clearly differentiate it from the product manufactured and sold by plaintiff." For example, we feel that it is proper for you to employ that trade style in the sale of your "Challenger" squeegees. In that connection, you must realize that the use you make of the trade style "Steccone Products Co." must be a fair use, that is to say, you cannot give greater prominence to the word "Steccone" than to the remaining words in the phrase; nor should you employ bold or excessively large type to display "Steccone Products Co." with small or diminutive type to identify your "Master" or "Challenger" brands.

4. We think it possible for you to employ your full name "Ettore Steccone," if you so desire, in connection with the making, advertising and selling of your squeegees. Bear in mind that there is actually no complete prohibition against the use of your name; it is only against your use of your surname, as "Steccone" or "Steccone's" standing alone and unaccompanied by other matter. It, therefore, seems clear to us that you could employ your name "Ettore Steccone" as a mark on your squeegee handles, squeegee rubbers and in advertising and we feel that the only condition posed upon you in that connection is that the words "Ettore" and "Steccone" should be given equal prominence as to style of lettering, size of lettering and color of lettering. We feel quite definite that in such a situation the word or name "Steccone" is accom-

panied by sufficient explanatory material so as to clearly differentiate it from the product manufactured and sold by the plaintiff as noted in the decision. We do not think that the notation "E. Steccone" would be satisfactory under the Court's decision.

5. We caution you against the continuation of the use of certain material or wording in your advertising. We refer specifically to phrases like the following which appear on the circular for the "Steccone's Master Squeegee":

"Be sure you buy the Genuine Steccone's Master Squeegee manufactured by the inventor and originator of the Steccone Squeegee. Be sure to ask for Steccone Master. Beware of imitations bearing our name."

and

"Ettore Steccone, the originator of the Steccone Squeegee and owner of the Steccone Products Co., has had no connection for more than six years with the firm that arbitrarily uses the name Steccone."

The latter expression also appears on the price circular issued by you on "Steccone's Master and Challenger Window Squeegees." Quite definitely some re-editing is here required. For your guidance we have marked the objectionable parts of duplicates of your advertising material and the same are attached hereto.

6. We caution you against any display of any name or phrase which includes the word "Steccone" in an oval design or an oval outline.

We appreciate that in these trade name cases it is difficult sometimes to interpret the decisions. The foregoing is the most reasonable interpretation we can place upon the ruling in your case. We caution you that it is necessary for you to follow carefully the advice of counsel in setting up substitute markings and names, and therefore believe it would be fitting and proper for you to submit to Mr. Peckham or the writer any proposals you may have along these lines.

I have not reached any conclusion concerning the advisability of appealing, but will reserve decision on that point until I see the exact nature of the findings of fact, conclusions of law and judgment to be approved and entered by the Court.

Yours very truly,

For NAYLOR and LASSAGNE

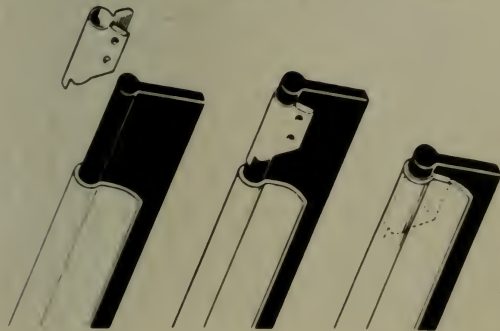
JMN:bae

Encl.

cc: Mr. Peckham

2962





1 The rubber is inserted in the handle — no pushing or pulling.

2 Then brass clip is slipped on into position and it takes but a second.

3 Then rubber and brass clip are pushed into the channel. The rubber is held in positive position, cannot slip, and the rubber wears longer and performs better.

For the window cleaner the STECCONE MASTER is the answer to today's need for greater efficiency and speed to provide higher wages with shorter hours.

*Ettore Steccone, the originator of the Steccone Squeegee and owner of the Steccone Products Co., has had no connection for more than seven years with the firm that arbitrarily uses the name Steccone.*

- Designed especially to do high quality work with speed and economy. A fine high quality tool made of special tempered brass that will stand hard usage and last for years.

- STECCONE'S MASTER SQUEEGEE is made with a replaceable rubber held in place by a patented brass clip.

- Be sure you buy the GENUINE STECCONE'S MASTER SQUEEGEE manufactured by the inventor and originator of the Steccone Squeegee. Be sure to ask for Steccone Master. Beware of imitations bearing our name.

- There is no economical substitute for quality.

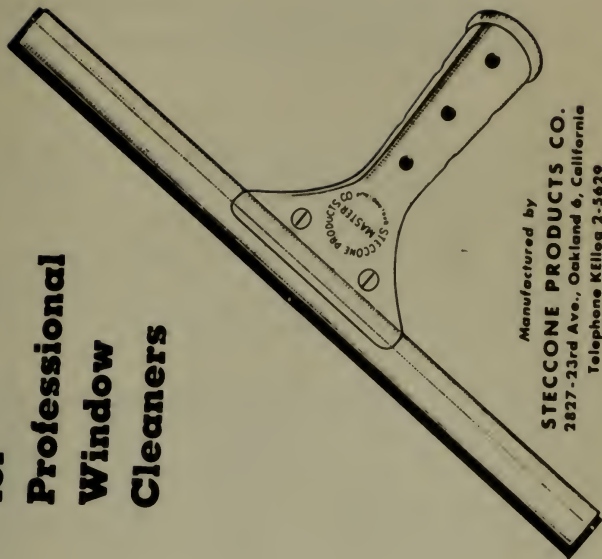




## MASTER

## SQUEEGEE

for  
Professional  
Window  
Cleaners



Manufactured by  
**STECCONE PRODUCTS CO.**  
2827-23rd Ave., Oakland 6, California  
Telephone KILleg 2-5629

from a window cleaner.

Most every window cleaner knows the Steccone Squeegee, but few know that the inventor, Effore Steccone, has been a window cleaner since 1920 and that the Steccone Master is a product fashioned from the experience of these many years of professional work.

The Steccone Master is manufactured by a professional window cleaner who knows the problems of the profession and has built a squeegee that adapts itself to every type of job—whether it be on the sidewalk, office building or private home. No matter how dirty the window may be, the Steccone Master removes the dirt film without going over it the second time. The patented clips and the improved handle have made the Steccone Master the most efficient, the easiest to handle, and the best squeegee that money can buy. Accept only the genuine **STECCONE MASTER SQUEEGEE** with the patented clips. It costs no more to have the best. You will clean more windows in less time and with less effort. Try a **STECCONE MASTER**. You'll never be satisfied with any other.

SOLD BY



# Steccone's CHALLENGER Squeegee

Challenger Squeegee is made especially for the professional window cleaner who desires a high grade tool. The Challenger is made of special tempered brass that holds and will give years of service.

STECcone's CHALLENGER meets all the requirements of the expert window cleaner—does a good job—easy to handle—made to wear.

THE CHALLENGER is a high quality tool which gives efficiency. No other squeegee performs better or longer.

● REPLACEABLE RUBBER—easy to insert and remove—wears better and lasts longer—performs better.

● SLIDING HANDLE—quickly adjusted to any position on the channel or put on any length channel.

● OUR MANUFACTURING TECHNIQUE and our great buying power allow us to sell at a very low price.

## LIST PRICE—SEPTEMBER 1, 1949—CHALLENGER WINDOW SQUEEGEES

	Complete Per Doz.	Channel—with Rubber—Per Doz.	Rubbers* Per Doz.	Shipping Wgt. Per Doz.	100-LB. SHIPMENTS
12"	\$20.60	\$11.40	\$3.20	8 ½ lbs.	Freight prepaid on 100 lb. shipments.
11"	20.00	10.75	3.00	8 ½ lbs.	
10"	19.20	9.90	2.70	7 ½ lbs.	
9"	18.10	8.80	2.50	7 lbs.	No freight allowed on shipments of less than 100 lbs.
8"	17.00	7.70	2.20	6 ½ lbs.	
7"	16.00	6.75	2.00	5 ½ lbs.	
6"	15.00	6.00	1.70	5 ½ lbs.	SHIPMENTS f. o. b. Oakland, California

HANDLES ONLY, \$9.25 per dozen. Shipping weight 4 lbs. per dozen.

SQUEEGEES PACKED IN INDIVIDUAL CARTONS, \$.60 NET extra per dozen.

Also available in 36" lengths.

Shipping weight on 18" Rubbers ONLY 12 lbs. per gross.

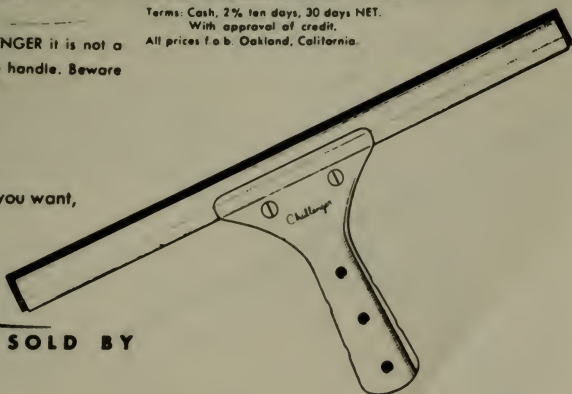
Terms: Cash, 2% ten days, 30 days NET.  
With approval of credit.  
All prices f. o. b. Oakland, California.

Not a STECCONE MASTER or CHALLENGER it is not a  
STECcone. Look for name on the handle. Beware  
imitations bearing the name Steccone.

Get the WINDOW SQUEEGEE that you want,  
Steccone Has It!

Manufactured by  
THE PRODUCTS CO.  
Ave., Oakland 6, Calif.  
Phone KEllog 2-3629

SOLD BY



WHEN ORDERING BE SURE TO SPECIFY WHAT KIND YOU WANT





# STECONE'S MASTER SQUEEGEE

FOR PROFESSIONAL WINDOW CLEANERS



1 The rubber is inserted in the handle—no pushing—no pulling.

2 Then brass clip is slipped on into position and it takes but a second.

3 Then rubber and brass clip are pushed into the channel. The rubber is held in positive position, cannot slip, and the rubber wears longer and performs better.

● Designed especially to do high quality work with speed and economy. A fine high quality tool made of special tempered brass that will stand hard usage and last for years.

STECONE'S MASTER SQUEEGEE is made with a replaceable rubber held in place by a patented brass clip.

The finest and most complete squeegee ever offered to the trade.

THERE IS NO ECONOMICAL SUBSTITUTE FOR QUALITY

LIST PRICE—SEPTEMBER 1, 1949—MASTER WINDOW SQUEEGEES

Size	Complete Per Doz.	Channel—with Rubber—Per Doz.	Rubbers* Per Doz.	Shipping Wgt. Per Doz.	100-LB. SHIPMENTS
18"	\$23.00	\$12.50	\$3.20	8 ½ lbs.	Freight prepaid on 100 lb. shipments.  No freight allowed on shipments of less than 100 lbs.
16"	22.50	12.00	3.00	8 ½ lbs.	
14"	21.50	11.00	2.70	7 ½ lbs.	
12"	20.50	10.00	2.50	7 lbs.	
10"	19.50	9.00	2.20	6 ½ lbs.	
8"	18.50	8.00	2.00	5 ½ lbs.	SHIPMENTS f. o. b. Oakland, California
6"	17.50	7.00	1.70	5 ½ lbs.	

BRASS HANDLES WITH LOCK RING \$10.50 per dozen. Shipping weight 4 lbs. per dozen.  
SQUEEGEES PACKED IN INDIVIDUAL CARTONS, \$.60 NET extra per dozen.

\*Rubbers also available in 36" lengths.

Shipping weight on 18" Rubbers ONLY 12 lbs. per gross.

Be sure you buy the GENUINE STECCONE'S MASTER SQUEEGEE manufactured by the inventor and originator of the Steccone Squeegee. Be sure to ask for Steccone Master. Beware of imitations bearing our name.

Terms: Cash, 2% ten days, 30 days NET.  
With approval of credit.  
All prices f.o.b. Oakland, California.

For today's need is greater efficiency and speed to provide higher wages with shorter hours.

Beware Steccone, the originator of the Steccone Squeegee and owner of the Steccone Products Co., has had no connection for more than six years with the firm that arbitrarily uses the name Steccone.

Manufactured by

STECONE PRODUCTS CO.

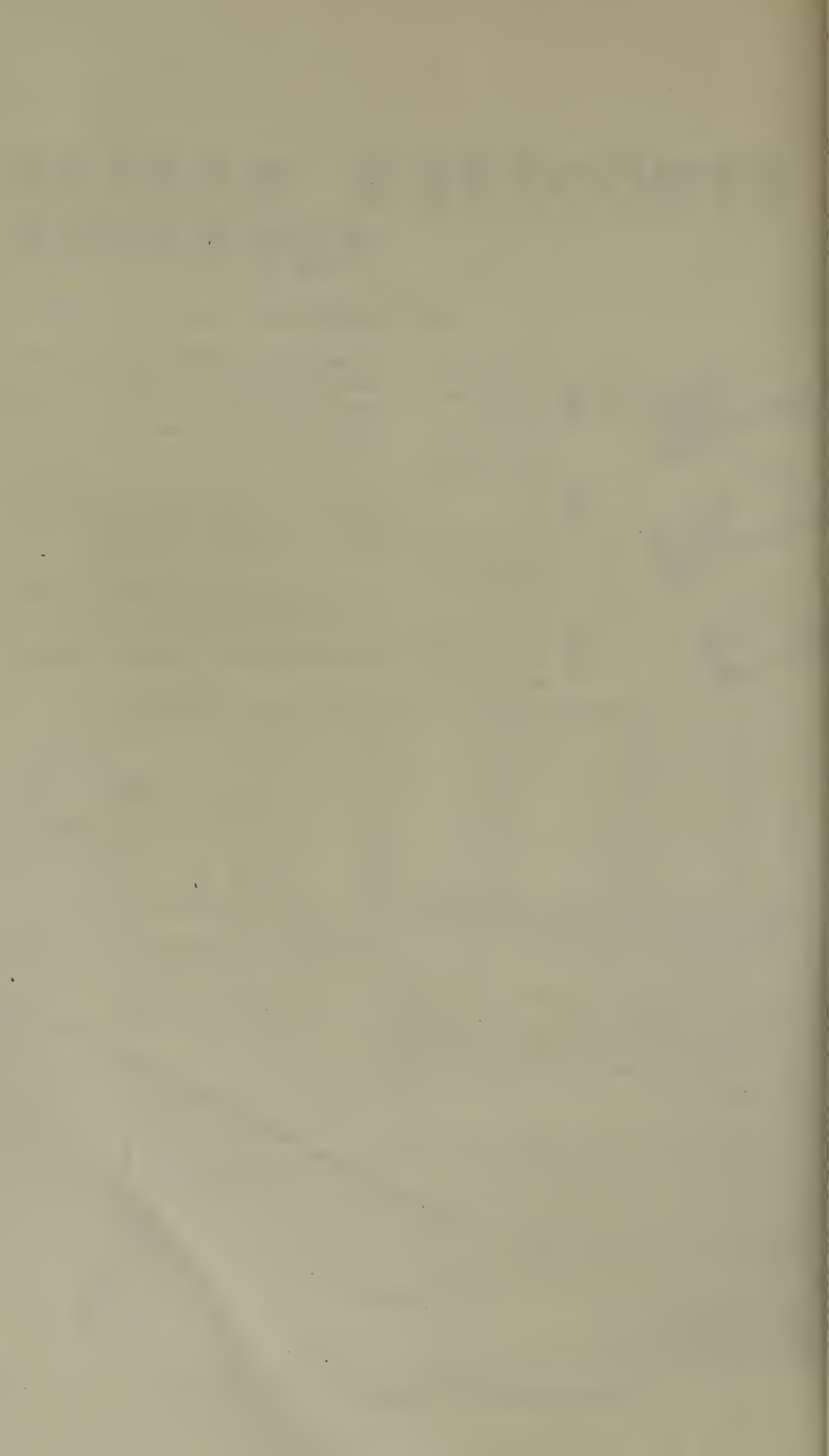
3027 23rd Ave., Oakland 4, Calif.

Telephone KEllog 2-5429

SOLD BY



WHEN ORDERING BE SURE TO SPECIFY WHAT KIND YOU WANT



# STECONE PRODUCTS CO.

2827 TWENTY-THIRD AVENUE • OAKLAND 6, CALIFORNIA

Telephone KEllog 2-5629

Manufacturers of

## STECONE'S MASTER AND CHALLENGER WINDOW SQUEEGEES

### Dealers' Discount Information

#### SQUEEGEES COMPLETE

**FREIGHT PREPAID ON 100 LBS. OR  
MORE . . . NO FREIGHT ALLOWED  
ON SHIPMENTS LESS THAN 100 LBS.**

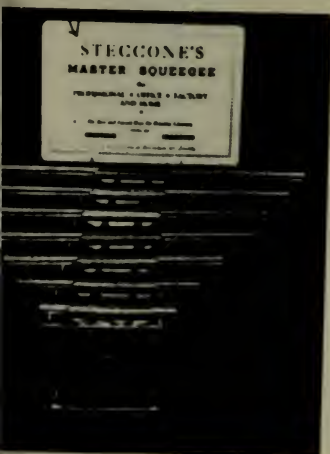
QUANTITY	DISCOUNT	
Under 1 Gross . . . . .	50%	
1 to 3 Gross . . . . .	50%	5%
3 to 5 Gross . . . . .	50%	7%
Over 5 Gross . . . . .	50%	10%

Sizes may be assorted

#### REPLACEMENT RUBBERS

Under 2 Gross . . . . .	50%	
2 to 4 Gross (Freight Prepaid) . . . . .	50%	
4 to 8 Gross (Freight Prepaid) . . . . .	50%	5%
8 to 16 Gross (Freight Prepaid) . . . . .	50%	10%
Over 16 Gross (Freight Prepaid) . . . . .	50%	15%

These discounts apply to single orders and shipments of the specified quantities for the account of the jobber. Discounts are applicable against published current list prices, F.O.B. factory, Oakland, California.



## DISPLAY RACK

**Price \$1.25 net**

Free with order for 6 dozen  
or more squeegees.

#### IMPORTANT

Etter Steccone, the originator of the Steccone Squeegee and owner of the Steccone Products Co., has had no connection for more than six years with the firm that arbitrarily uses the name Steccone.



EXHIBIT B

(Copy)

Naylor and Lassagne

Attorneys at Law

Patent—Trade Mark and Copyright Matters

Russ Building

San Francisco 4, California

February 8, 1950

Mr. Ettore Steccone

Steccone Products Co.

2827 Twenty-third Avenue

Oakland 6, California

Re: Morse-Starrett Products Co.

v. Steccone—No. 27081-H

Dear Mr. Steccone:

In our conference of January 17th, 1950, you stated that you had decided not to take an appeal from the final judgment signed and entered on January 11th, 1950. We confirm this because but thirty days is allowed for appeal and the time will expire on Friday, February 10th. Therefore, we will allow that date to pass without taking any action.

Also during the January 17th conference you asked me to review the Court's judgment and advise you to what extent and in what manner the word "Steccone" could be employed in the marking of your products and in the advertisement thereof. Some language was proposed and discussed but you did not indicate the exact language you desire to employ. While I will not undertake to serve as a copy writer for you nor act as a substitute for your



advertising counsellor in the choice of particular language, nevertheless I will review the judgment and endeavor to assist you by pointing out the things which you should not do. Following your receipt of this letter it is suggested that you talk with your advertising counsel or printer, follow the suggestions made herein and then submit to Mr. Peckham or the writer a draft of what you propose to use so that we can approve it. I caution you to follow this procedure very carefully as it is the only way in which attorneys can assume the responsibility called for in your present position.

At the outset, I will advise that I checked plaintiff's and defendant's exhibits at court and am familiar with the various markings which appear thereon. I have also reviewed my letter of November 8th with sample advertisement annexed and believe it would be well for you to take that letter to your advertising counsellor or your printer along with this communication, for complete guidance.

The judgment language is rather explicit. In the first place, there is an absolute prohibition against employment of the trade name "Steccone" enclosed by an oval. Secondly, there is a prohibition against your so using the name "Steccone" that reasonably attentive purchasers cannot readily distinguish between the products of plaintiff and defendant, but this is qualified by the provision that you may make, advertise and sell squeegees as the product of Steccone Products Co., or as your product.

"so long as the name 'Steccone,' used alone

or in conjunction with other words or symbols, on the squeegees or in the written advertising thereof, is accompanied by sufficient explanatory material so as to clearly differentiate it from the product manufactured and sold by plaintiff.”

Noting that Plaintiff’s Exhibit 19 on the trial is one of your squeegee heads whereon the word “Master” appears within the circular disposition of “Steccone Products Co., Oakland, California,” we think it plain that the Court had no intent to enjoin you against the use of that marking, for there the word “Steccone” is accompanied by sufficient explanatory material so as to clearly differentiate it from the product manufactured and sold by plaintiff. For example, the featured mark is “Master” and “Steccone” is relegated to a position of secondary importance, being but a part of the name of the manufacturer and without special emphasis. If the Court had had something different in mind, it would have enjoined you against using the trade style “Steccone Products Co.”

We feel that what the Court was condemning was a trade-mark use such as you made of the word “Steccone” on the flexible squeegees, the blade of which was marked simply “Steccone Pat. Pend.” (Defendant’s Exhibit G). Additionally, we think the Court was condemning the advertising use you had been making, prior to and during trial, wherein the word “Steccone” was being featured (see our letter of November 8th, 1949, for detailed comment on your advertising material).

Therefore, we feel that you should most certainly discontinue the marking of flexible squeegees, or any other product, with wording such as: "Steccone," whether or not the same be accompanied by a phrase such as "Pat. Pend."

With respect to advertising, we again call your attention to our letter of November 8th, 1949, because it is rather complete in its treatment of what you should do or should not do. Under no circumstances, should the word "Steccone" be emphasized or featured in comparison to the other word matter with which it may be associated. Thus, if the words "Ettore Steccone" or "Steccone Products Co." are employed, the word "Steccone" should be in type of the same size as the accompanying words.

During our conference you asked a number of questions concerning your right to refer to the fact that you had invented a squeegee and received a patent for the same. The only specific proposal on which you wanted our advice was whether or not you could reproduce the drawing sheet from your patent showing the number, date, your name and the device that was patented, and include such a representation in your advertising matter. We expressed the opinion then, and we confirm it now, that we see no objection to such a procedure, provided such reproduction is accompanied by or bears upon its face a very plain statement to the effect that the patent was held invalid by the Seventh Circuit Court of Appeals. If left unaccompanied by such an explanatory statement, the observer would

get the impression that the patent is still in force and effect, which is not the case, and the Court might well say that you had gone too far.

I hope the foregoing suggestions will be helpful to you and now await specific proposals in the way of draft copies or proof sheets of what you propose to employ, so that Mr. Peckham and I can give the same final approval.

Yours very truly,

For NAYLOR and LASSAGNE

JMN:bae

EXHIBIT C

Steccone Products Co.  
2827 Twenty-third Avenue  
Oakland 6, California  
Telephone KEllog 2-5629

February 15, 1950

Naylor and Lassagne  
420 Russ Building  
San Francisco 4, California

Dear Mr. Naylor:

Your letter of February 8, 1950, does not say anything that you did not say in your letter of November 28, 1949.

The most important thing I want to know is how I can word the section bracketed in pencil on the enclosed envelope stuffer. I would like to use the following:

“Ettore Steccone, the originator of the Steccone Squeegee, and owner of the Steccone Prod-



ucts Co., has had no connection for more than eight years with the firm that uses the name Steccone as a trade-mark on their squeegees."

If you do not think this is proper would you suggest wording that would be suitable for this purpose. I do not see anything wrong with the wording I have suggested but, of course, I am not a lawyer and I know very little about the law. The only thing I do know is that this is the truth. As you know, I am the originator of the Steccone Squeegee and the first squeegee the Morse-Starrett people put out was stamped "Steccone" and bore my patent number. I still have some samples of that in my possession.

The two most important things that I want to bring out on this is that I am the originator of the Steccone Squeegee and that I have nothing to do with the firm that uses the name "Steccone" as a trade-mark. The wording is immaterial as long as it brings out these facts which are the truth.

It is imperative that I put out a new Price List as the one I have now is obsolete. Therefore I would appreciate it very much if you will let me have your opinion of this matter just as soon as possible.

Thanking you.

Sincerely,

STECCONE PRODUCTS  
COMPANY,

/s/ E. STECCONE.

Encl.

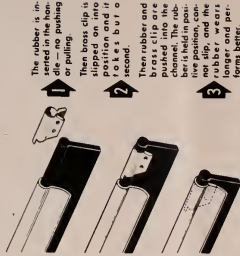
ES/ep



EXHIBIT D

# STECONE'S MASTER

THE FINEST SQUEEGEE EVE



1 The rubber is inserted in the handle — no pushing or pulling.

2 Then brass clip is slipped on into position and it takes but a second.

3 Then rubber and brass clip are pushed into the channel. The rubber is held in positive position, cannot slip, and the rubber wears longer and performs better.

For the window cleaner the STECCONE MASTER is the answer to today's need for greater efficiency and speed to provide higher wages with shorter hours.

Effort Steccone, the originator of the Steccone Squeegee and owner of the Steccone Products Co., has had no connection for more than seven years with the firm that arbitrarily uses the name Steccone.

DOES A BETTER JOB,

EXHIBIT E

(Copy)

Naylor and Lassagne

Attorneys at Law

Patent — Trade Mark and Copyright Matters

Russ Building

San Francisco 4, California

February 20, 1950

Mr. Ettore Steccone  
Steccone Products Co.  
2827 Twenty-third Avenue  
Oakland, California

Re: Morse-Starrett Products Co.  
v. Steccone—No. 27081-H

Dear Mr. Steccone:

This will reply to your letter of February 15th wherein you asked for further guidance, in the selection of appropriate language to be employed in your advertising material as an aftermath of the Court's judgment in the above-entitled proceeding.

Mature reflection leads us to believe that it would be appropriate for you to employ a statement such as the following:

"Ettore Steccone, who was granted Patent No. 2,123,638\* on July 12, 1938, for a squeegee, has no connection with Morse-Starrett Products Co., which was once licensed under this patent,

---

"\*Held invalid in *Morse-Starrett Products Co. v. Standard American Window Safety Device Co.*, 115 F (2d) 574."

but has canceled its license and continues to sell squeegees marked: **STECCONE**

It is our feeling that the above-quoted language is not only a strict adherence to the truth but includes "sufficient explanatory material so as to clearly differentiate it from the product manufactured and sold by plaintiff" as called for in Paragraph XIII of the judgment signed and entered by the Court on January 11, 1950.

For the record we will say that the language recommended above is not subject to any revision or re-editing unless approval is first had from Mr. Peckham or the writer.

Yours very truly,

For NAYLOR and LASSAGNE

JMN:bae

cc: Mr. Peckham

2962

# STECcone'S MASTER SQUEEGEE

FOR PROFESSIONAL WINDOW CLEANERS



1 The rubber is inserted in the handle—no pushing—no pulling.

2 Then brass clip is slipped on into position and it takes but a second.

3 Then rubber and brass clip are pushed into the channel. The rubber is held in positive position, cannot slip, and the rubber wears longer and performs better.

● Designed especially to do high quality work with speed and economy. A fine high quality tool made of special tempered brass that will stand hard usage and last for years.

STECcone'S MASTER SQUEEGEE is made with a replaceable rubber held in place by a patented brass clip.

The finest and most complete squeegee ever offered to the trade.

THERE IS NO ECONOMICAL SUBSTITUTE FOR QUALITY

## LIST PRICE, OCTOBER 1, 1948—MASTER WINDOW SQUEEGEES

Size	Complete Per Doz.	Channel—with Rubber—Per Doz.	Rubbers* Per Doz.	Shipping Wgt. Per Doz.	100-LB. SHIPMENTS
18"	\$23.00	\$12.50	\$3.20	9 lbs.	We make a freight allowance of \$2.00 per cwt. to all points east of Salt Lake City on shipments of 100 lbs. or over. No freight allowed on shipments of less than 100 lbs.
16"	22.50	12.00	3.00	9 lbs.	
14"	21.90	11.40	2.70	8 lbs.	
12"	21.40	10.90	2.50	7 lbs.	
10"	20.80	10.30	2.20	7 lbs.	
8"	20.20	9.70	2.00	6 lbs.	SHIPMENTS f.o.b. Oakland, California
6"	19.60	9.10	1.70	6 lbs.	

BRASS HANDLES WITH LOCK RING \$10.50 per dozen. Shipping weight 4 lbs. per dozen.

SQUEEGEES PACKED IN INDIVIDUAL CARTONS, \$.60 NET extra per dozen.

\*Rubbers also available in 36" lengths.

Shipping weight on 18" Rubbers ONLY 12 lbs. per gross.

Be sure you buy the GENUINE STECCONE'S MASTER SQUEEGEE manufactured by the inventor and originator of the Steccone Squeegee. Be sure to ask for Steccone Master. Beware of imitations bearing our name.

Terms: Cash, 2%, ten days, 30 days NET.  
With approval of credit.  
All prices f.o.b. Oakland, California.

For today's need is greater efficiency and speed to provide higher wages with shorter hours.

Beware Steccone, the originator of the Steccone Squeegee and owner of the Steccone Products Co., has had no connection for more than six years with the firm that arbitrarily uses the name Steccone.

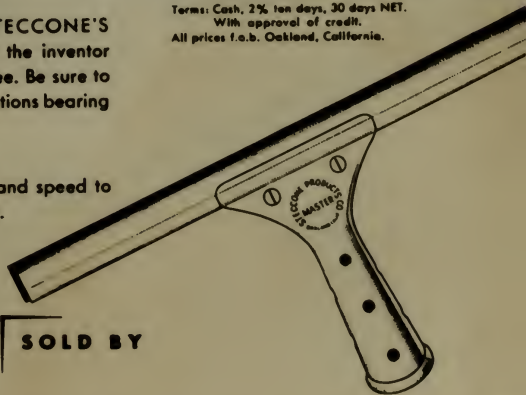
Manufactured by

STECcone PRODUCTS CO.

2827 23rd Ave., Oakland 4, Calif.

Telephone KElley 2-5629

SOLD BY



WHEN ORDERING BE SURE TO SPECIFY WHAT KIND YOU WANT





# Steccone's CHALLENGER Squeegee

The Challenger Squeegee is made especially for the professional window cleaner who requires a high grade tool. The Challenger is made of special tempered brass that holds up and will give years of service.

● STECCONE'S CHALLENGER meets all the requirements of the expert window cleaner—does a good job—speedy—nice to handle—made to wear.

● THE CHALLENGER is a high quality tool which gives great efficiency. No other squeegee performs better or lasts longer.

● REPLACEABLE RUBBER—easy to insert and remove—wears better and lasts longer—performs better.

● SLIDING HANDLE—quickly adjusted to any position on the channel or put on any length channel.

● OUR MANUFACTURING TECHNIQUE and our great buying power allow us to sell at a very low price.

## LIST PRICE—OCTOBER 1, 1948—CHALLENGER WINDOW SQUEEGEES

Size	Complete Per Doz.	Channel—with Rubber—Per Doz.	Rubbers* Per Doz.	Shipping Wgt. Per Doz.	100-LB. SHIPMENTS
18"	\$20.60	\$11.35	\$3.20	9 lbs.	We make a freight allowance of \$2.00 per cwt. to all points east of Salt Lake City on shipments of 100 lbs. or over. No freight allowed on shipments of less than 100 lbs.
16"	20.10	10.85	3.00	9 lbs.	
14"	19.50	10.25	2.70	8 lbs.	
12"	18.95	9.70	2.50	7 lbs.	
10"	18.40	9.15	2.20	7 lbs.	
8"	17.95	8.70	2.00	6 lbs.	SHIPMENTS f.o.b. Oakland, California
6"	17.30	8.10	1.70	6 lbs.	

BRASS HANDLES ONLY, \$9.25 per dozen. Shipping weight 4 lbs. per dozen.

SQUEEGEES PACKED IN INDIVIDUAL CARTONS, \$.60 NET extra per dozen.

\*Rubbers also available in 36" lengths.

Shipping weight on 18" Rubbers ONLY 12 lbs. per gross.

Terms: Cash, 2% ten days, 30 days NET.  
With approval of credit.  
All prices f.o.b. Oakland, California.

If it is not a STECCONE MASTER or CHALLENGER it is not a GENUINE STECCONE. Look for name on the handle. Beware of imitations bearing the name Steccone.

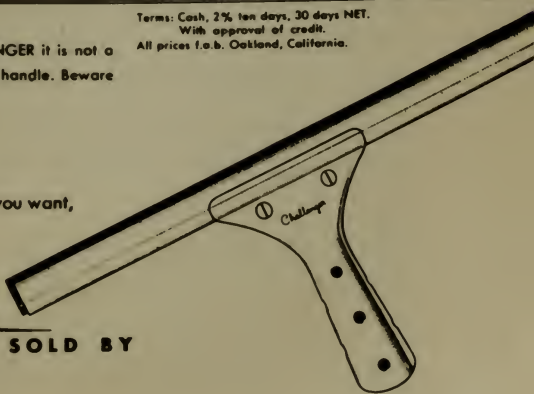
If it's a WINDOW SQUEEGEE that you want,  
**Steccone Has It!**

SOLD BY

Manufactured by  
**STECONE PRODUCTS CO.**  
17 23rd Ave., Oakland 4, Calif.  
Telephone KEllog 2-5629

WHEN ORDERING BE SURE TO SPECIFY WHAT KIND YOU WANT

[ENDORSED]: FILED JULY 26, 1950.





[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF HEARING  
ON ORDER TO SHOW CAUSE

Wednesday, July 26, 1950

Appearances:

JACK E. HURSH, ESQ.,

For the Plaintiff.

JAMES M. NAYLOR, ESQ.,

For the Defendant.

Mr. Hursh: May it please your Honor, this is a hearing on order to show cause in the case of Morse-Starrett Products Company versus Ettore G. Steccone, an individual doing business under the firm name and style of Steccone Products Company. Your Honor will remember the trial was had about a year and a half ago.

The Court: I remember all about it; and I issued injunction against the use of the name "Steccone" on these squeegees made by him unless they were identified so that the public wouldn't believe they were produced by Morse-Starrett Products Company.

Mr. Hursh: That is true. Attached to our petition we have certain exhibits, and Mr. Naylor this morning served on me affidavit of Mr. Steccone that shows some additional advertising material. I would like to ask Mr. Steccone about those circulars. I don't see him in the courtroom. Is he going to be here, Mr. Naylor?

Mr. Naylor: No, not to my knowledge.

Mr. Hursh: Well, as I understood, the Court's order was that Mr. Steccone would appear this morning. I would like to find out whether or not any of the advertising material appearing in his affidavit was ever published and issued to the trade. Can you answer that?

Mr. Naylor: Which do you have in mind, Mr. Hursh?

Mr. Hursh: Well, I don't know what exhibit it is. This circular and this circular (indicating).

Mr. Naylor: That is 1948. All that material is prior to the trial. All that is prior to the trial.

Mr. Hursh: I would also like to have asked Mr. Steccone with respect to Exhibit 1, as to the material contained in Exhibit 1.

The Court: Do you mean your petition?

Mr. Hursh: Yes, on our petition for an order to show cause. But we particularly—I might state with respect to Exhibit 1, your Honor, that this was published by inserting it in what is known as the Window Cleaner, which is a trade journal published generally throughout the United States in the window cleaning industry; and on or about December 27th Morse-Starrett Products Company received the December issue of this trade publication and as an insert in the trade publication was the circular, Exhibit 1; and we consider that to be a violation of the Court's memorandum opinion and order entered October 25, 1949. Particularly the statement that, "Ettore Steccone, the originator of the Steccone Squeegee and owner of the Steccone

Products Company, has had no connection for more than six years with the firm that arbitrarily uses the name Steccone. Manufactured by Steccone Products Co.”; and just about that, “Be sure you buy the genuine Steccone’s Master Squeegee.” We think that is an additional violation of the Court’s memorandum opinion.

After the entry of the opinion, the Court entered judgment on January 11th, and subsequent to the entry of the judgment, sometime in April of this year—April 11th, I believe it is—The Morse-Starrett Products Company received numerous other advertising circulars that were published by the defendant herein, and we feel that these advertising circulars are also in contempt of this Court’s order.

The Court: What does my judgment say there? Just read it.

Mr. Hursh: The judgment states in Paragraph IV—the first three paragraphs are in relation to the parties and jurisdiction: “That plaintiff is the owner of the trade-name ‘Steccone’ enclosed by an oval and is entitled to the exclusive use thereof for squeegees as between the parties to this action.

“V. That as between the parties to this action, the plaintiff is the owner of the legal title to the United States Trade-Mark Registration Nos. 371,776, dated October 3, 1939, and 502,662, dated October 5, 1948.

“VI. That plaintiff’s trade-name ‘Steccone’ has acquired a secondary meaning as solely identifying the products of plaintiff and plaintiff’s products alone.



“VII. That defendant has unfairly competed with plaintiff.

“VIII. That plaintiff has not unfairly competed with defendant.

“IX. That plaintiff has not infringed upon any trade-mark.

“X. That defendant proved no damages against plaintiff.

“XI. That the cross-complaint herein be and the same is hereby dismissed.

“XII. That plaintiff waived its claim for damages against defendant.

“XIII. That a writ of injunction issue out of and under the seal of this Court enjoining and restraining the defendant, his associates, attorneys, employees, servants, agents, and those in privity with him, or them, from in any manner using the trade-name ‘Steccone’ enclosed by an oval in connection with squeegees, or the handles thereof, and from so using the name ‘Steccone’ that reasonably attentive purchasers cannot readily distinguish between the products of plaintiff and defendant, provided, however, that defendant may make, advertise and sell squeegees as the products of the Steccone Products Co., or as defendant’s product, so long as the name ‘Steccone,’ used alone or in conjunction with other words or symbols, on the squeegees or in the written advertising thereof, is accompanied by sufficient explanatory material so as to clearly differentiate it from the product manufactured and sold by plaintiff.

“XIV. That plaintiff recover from defendant its costs and disbursements in this suit in the sum of \$. . . . . and have execution therefor.”

We contend that the advertising material published by the defendant is in direct violation of that judgment in that that advertising material unfairly competes with the plaintiff. In Exhibit 2——

The Court: I have read Exhibit 2.

Mr. Hursh: All these exhibits have the same general pattern. We state he has used the name “Steccone Products Company,” the name “Steccone,” and also has used our trade-mark in connection with the small print margin which states that “Ettore Steccone, who was granted Patent No. 2,123,638 on July 12, 1938, for a squeegee, has no connection with Morse-Starrett Products Co., which was once licensed under this patent, but has canceled its license and continues to sell squeegees marked: ‘Steccone,’ using our trade-mark legend.” Then the footnote, “Held invalid in *Morse-Starrett Products Co. v. Standard American Window Safety Device Co.*, 115 F. (2nd) 574.”

That makes it appear the plaintiff is a pirate, but still using this trade-mark Steccone, holds the plaintiff up to ridicule in the industry, and we do not think that complies with this Court’s judgment. We think that each of these documents are a direct violation of the Court’s order.

Then turning to the March-April circular, the Window Cleaner publication for 1950, we find three advertisements contained therein. That is Exhibit 5, your Honor. On Page 3 of the publication is an

advertisement of the Sterling Sanitary Supply Corporation which advertises "Steccone's Master Squeegee," and just on the column above Sterling's ad is F6rmula Products, Inc., of Newark, New Jersey, that advertises "Genuine Steccone Rubbers, 18", \$22.50 per gross." And on Page 7, in the last column, is an advertisement of Pearl Brothers advertising "Genuine Steccone Rubber, \$20.00 gross, \$2.00 dozen; Genuine Steccone Squeezes (complete with Handle & Rubber), \$12.00 a dozen."

I was served this morning affidavit and memorandum on behalf of Steccone. He contends Sterling Sanitary Supply Corporation is a jobber of his, that he has no control over this jobber or any advertisement put out by the jobber, and that Exhibit 1 to the original petition shows an advertisement that was composed solely by Sterling Sanitary Supply Corporation, that he has no control over this jobber. He denies knowledge of it.

The Court: I believe he states Pearl Brothers——

Mr. Hursh: Handle both the plaintiff's and the defendant's products. In our prayer we are asking that this Court amend its judgment doing away with this possibility of confusion that the defendant contends is possible because of the fact that the judgment is not clear and distinct as to what he can and what he can't do. We think the judgment is, if properly interpreted, perfectly clear in that he should not use the name Steccone in any manner unless he differentiates his product from Morse-Starrett Products Company squeezes in a fair manner, not in the manner he has done in Exhibits

2, 3 and 4. We think definitely this is a violation of the Court's judgment.

Also in the memorandum of authorities served and filed by the defendant he states no injunction was issued. I would like to refer to the case of Denver-Greeley Valley Water Users Association, et al., vs. McNeil, et al., 131 Fed. (2nd) 67. The Court stated:

“It is well settled that disobedience of any lawful and valid judgment, decree, or order of a court acting within its jurisdiction of which one has notice or actual knowledge constitutes contempt of court.”

Also, *Western Fruit Growers vs. Gotfried*, 136 Fed. (2nd) 98, in which the Court said:

“However, if a court has jurisdiction over both parties and the subject matter, an order must be obeyed so long as it remains the order of the court.”

We contend that this judgment is an order of this Court.

In *re Sylvester*, 41 Fed. (2nd) 231, the court stated:

“Courts' orders must be precisely and promptly obeyed. A person who fails so to obey a court order is guilty of a technical contempt and is punishable therefor.”

Mr. Steccone's excuse for all this is that he advised with his counsel to determine just how far he could go, and attached to his affidavit are letters



from his counsel, Exhibit "A" and Exhibit "B." I haven't had an opportunity to read all of them as yet, but therein counsel attempted to interpret this Court's judgment and interpreted it far more liberally toward Mr. Steccone, defendant herein, than we think is proper. This is no excuse for such contempt. I would like to cite to your Honor the following authorities:

U. S. vs. Goldfarb, 167 Fed. (2nd) 735, which states:

"Even advice of counsel is not a defense to an act of contempt, although it may be considered in mitigation of punishment."

Also, Bigelow vs. RKO Radio Pictures, et al., 78 Fed. Sup. 250, the court said:

"In every case, however, these officials were merely following the advice of their attorneys. While their attorneys may have acted imprudently in giving opinions with reference to the views of this court, and while counsel may have arrived at erroneous conclusions in so doing, the reliance of these respondents upon counsel for the interpretations of a legal document was reasonable and natural. Although it is no doubt true that in a civil contempt proceeding neither advice of counsel nor good intentions can sterilize conduct otherwise contemptuous."

We submit, your Honor, that these advertisements that are continually being published by the defendant are contemptuous of this Court's order. As a matter of fact, after the first circular, Exhibit



1, was directed to my attention by the Morse-Starrett Products Company, I telephoned Mr. Peckham and complained bitterly about this particular advertisement. He said he would take the matter up with Mr. Steccone and if there was anything improper in that advertisement it would be corrected. Evidently Exhibits 2, 3 and 4 are the attempt at a correction, which we still contend violates this Court's judgment; and we submit the defendant should be held in contempt, and that he should be assessed pecuniary damages in the amount of \$1,000.00 and counsel fees in the amount of \$500.00.

Mr. Naylor: If the Court please, I would like to file at this time an affidavit of the defendant, Ettore G. Steccone; affidavit of E. P. Gilsdorf, and Memorandum of Points and Authorities in Opposition to the Order to Show Cause, with the Court's leave.

These cases, as your Honor is well aware, always present difficulties. I think that is apparent in your Honor's thinking in the type of judgment which was entered herein, because the judgment is a type which contains absolute prohibitions, which we think have been satisfied in the material this man has used, but in addition it had the permissive aspect, and this permissive aspect apparently is the thing which gives plaintiff's counsel difficulty. I don't see any reason for such difficulty, and I don't see any reason for the scanning of the minutia of the man's advertising such as represented by those things which were subject to his control.

I would like first to dispose of Exhibits 1 and 5,

appearing on the petition for the order to show cause. They can be disposed of upon the strength of the affidavit of Ettore Steccone which was filed this morning with the Court.

First let it be noted that the most that the plaintiff has been able to show here is an allegation upon information and belief, if you will, that such party as Sterling Sanitary Supply Corporation are agents or agents and distributors of defendant Ettore Steccone. Now, in refutation of that Ettore Steccone denies that these people are anything more than mere jobbers and dealers, and that distinction is important, your Honor, for this reason. A judgment such as we have here usually reaches the agents of the defendant, or the party sought to be enjoined, but it will not extend as far as independent dealers who are acting independently of the defendant. The affidavit of Ettore Steccone shows that with respect to Sterling Sanitary Supply Corporation, that corporation merely buys in quantity lots from him at a discount commensurate with the quantity and jobs and sells his products as an ordinary dealer in this merchandise. Now that, I think, squarely meets the allegation upon information and belief asserted by the plaintiff in this action on the petition for order to show cause.

The affidavit of Ettore Steccone further shows that, with respect to Exhibit 1, he had no prior knowledge of the issuance of that particular piece by Sterling Sanitary. And he shows a price list, or discount sheet, which is Exhibit "F," on his affidavit filed this morning, from which the material

embraced in Exhibit 1 was taken. That price list appears to be dated October 1, 1948. It is therefore evident from a comparison of those two exhibits only that Sterling Sanitary Supply Corporation used the material of the 1948 price list in the making up of the piece which is here complained of by the plaintiff as Petitioner's Exhibit 1.

That, I think, coupled with the other aspects of his affidavit, clearly shows that there was no connivance. There was no request that we let Sterling insert the item or use this material. Obviously, Sterling was using such material as it had on hand in the preparation of it.

With respect to Exhibit 5, which contains the advertisements of three parties, that being the copy of the Window Cleaner, the affidavit of Steccone shows that he was not informed that Sterling Sanitary Supply Corporation was going to insert that ad. Here again we have an independent act of a jobber or dealer making up some copy with respect to the products he sells. And on that particular proposition, in a contempt proceeding it has been held that, in *Tubular Heating & Ventilating Co. vs. Mt. Vernon Furnace & Mfg. Co., et al.*, 2 Fed. (2d) 982, at 985:

“The actions of the dealer in Philadelphia were not the actions of the defendants, and the defendants had no control over him.”

Now, there is a reason for that, and it goes back much further. The courts have never in trying an original action for trade-mark infringement, been

prepared to bridge the gap between the manufacturer with a particular mark and his several dealers in the trade; and the authority for this is a long line of cases, of which *Coates v. Merrick Thread Co.*, 149 U.S. 562, 573; 13 Sup. Ct. 966, is the lead-off case, with others coming down the list to *Armour & Co. v. Louisville Provision Co.*, 283 Fed. 42, a Sixth Circuit case.

That rule applies to all of the several ads contained in the Window Cleaner. They are inserted by independent jobbers, independent dealers, over whom Steccone has no control whatsoever; and he therefore accepts no responsibility for them, and justly so.

With respect to the three other pieces, namely, Exhibits 2 and 3 and 4 on the petition, I would like to acquaint the Court with this continuity of events so that it will be plainly seen that every reasonable effort has been made to comply with your Honor's judgment in this case.

When your Honor handed down your opinion in October of last year, Mr. Steccone and Mr. Peckham called at my offices and asked if I would review that opinion, and particularly the authorities which your Honor had cited on the concluding page, some five authorities, to determine what plans Steccone would have to make for the future with respect to his markings on his article as well as his advertising. I prepared, after studying your Honor's opinion and reading and briefing the five authorities which your Honor had cited at Page 20 of the Memorandum, presumably as a guide to counsel as



to how the judgment to eventually come could be complied with—I prepared a careful opinion to Mr. Steccone. That opinion appears, copy of it at least, as Exhibit “A” of Steccone’s affidavit of today.

In that a conscientious effort was made to eliminate the difference between those things which were expressly forbidden and prohibited by this defendant and those that were permissive. Because surely there is permissive language in the judgment. Thereafter, your Honor entered the Court’s judgment in January, 1950. Mr. Steccone and Mr. Peckham again returned with a copy of your Honor’s judgment, because in the opinion of November 8, Exhibit “A,” I had stated to them that it would be advisable to return when the exact nature of the findings, conclusion and judgment to be approved and entered would be ascertained. They then returned and asked specific questions and a set of specific replies were prepared. These are found in Exhibit “B,” an opinion of February 8th, shortly after the judgment was entered.

In those opinions an effort was made to set up the signals for Mr. Steccone in his future conduct, both as to things prohibited and things permitted.

Thereafter Mr. Steccone submitted written request for a supplemental expression of opinion, which likewise appears as Exhibit “C” on his affidavit filed this morning, along with Exhibit “D,” a piece of advertising material. Then a reply was given on that as Exhibit “E.”

That is the story with respect to what the defendant has done in, as I say, a conscientious effort



to abide by this Court's judgment and do the things which his counsel and he understood the Court wanted done.

Now as we come to your Honor's precise language in the judgment we find, as I said before, certain permissives, certain permissive aspects, and certain things which are absolutely forbidden. In our Memorandum of Points and Authorities, at Page 5, we have laid an apposite chart to show the language of his Honor's judgment and to characterize in apposition the conditionals and permissives, and endeavored to set up with respect to Exhibits 2, 3 and 4 those things for which the defendant here admits responsibility in particular relation to the judgment language.

Now, it was thought upon construing your Honor's judgment in this case, because of the language of the proviso therein, "Provided, however, that defendant may make, advertise and sell squeegees as the products of Steccone Products Company, subject to the accompanying explanatory material," that that was recognition of the man's right to continue using the trade style "Steccone Products Co." the proviso being that he accompany it by such other explanatory material as would clearly identify him as distinguished from Morse-Starrett Products Co.

In the very next permissive the proviso states, "Provided, however, that defendant may make, advertise and sell squeegees as products of Steccone Products Co. or as defendant's products."

Now, who is the defendant? The defendant is

Ettore Steccone. Therefore, it was concluded not only could he use "Steccone Products Co.," but he could identify himself by the use of his full name, Ettore Steccone, provided he did so fairly; and we submit Exhibits 2, 3 and 4 of this petition indicate a fair use of it when the whole piece of material is examined.

And again it was felt that the accompanying material, the accompanying explanatory material, had to be, as your Honor advisedly chose the words, "Sufficient to distinguish the one product from the other." Now we did not, and I will state this frankly to the Court, we did not treat your language, "sufficient explanatory material," as being a synonym in the well-established rule in explanatory phrases, and there was a reason for that, the distinction being this:

Explanatory material, as we understand the authorities on it, refer to the whole environment in which the particular material is used. The address is important. The trade name is important. Appearance is important. Any secondary trade-marks, such as "Steccone Master," is an important factor in contributing to the sum total of "sufficient explanatory material." The explanatory phrase, on the other hand, is that age-old device which the courts adopted many years ago of requiring one to say, "not connected with." "Not connected with." And then to state the name of its original party, or first party to use the mark, or whatever it may be. There is that distinction between "explanatory material" and "explanatory phrase."

But in addition, the five authorities on which your Honor relied and which you cite at Page 20 of your memorandum did not call for a norm in an explanatory phrase as distinguished from explanatory material.

As stated in our memorandum of points and authorities, two of those cases, which were of a vicious type where somebody had been a Johnny-come-lately to the business and had no antecedent history such as this defendant, were estopped, that they were not to use it. In three cases no such requirement was made, and as in the Chickering case, the court ordered a particular set-up of trade name and a particular use of the trade style of Chickering Brothers.

In the other case, which I think is a fair guide of what Steccone has done here, they required that the defendant use his full name, such as Ettore Steccone; provided, that the two names, that is, the man's name and surname, be displayed in the same type, the same font of type, the same color and with equal prominence.

With those guides in mind, when we come to the exhibits on the petition, particularly Exhibits 2, 3 and 4, we find that Ettore Steccone has done precisely that which was required in the last case cited in your Honor's memorandum. Not the last case. That was the Dougherty case. The whiskey label case. For we find there "Ettore Steccone" in type of constant size, same font, with equal prominence. The name is accompanied by his secondary mark, which is "Master," accompanied by the word

“squeegee.” Obviously Morse-Starrett has nothing comparable to “Master.” Therefore, “Master” is a contributing factor, being in the nature of explanatory material used in combination with the defendant’s own name, not the name “Steccone” per se.

When we come to Exhibit 3 we find a similar set-up in that “Ettore Steccone” is again displayed in type of constant size, same font, appearance and prominence. And there again there is a host of accompanying explanatory material under the main issue in the matter in which there is an existing patent which he has relating to the squeegee construction—not the one which was involved in the earlier case and held invalid, but another. And there is a series of illustrations on it, in general pointing up his business and not the business of Morse-Starrett.

In Exhibit 4, “Steccone Products Co.”—again using his name. “Manufacturers Ettore Steccone Window Squeegees”—again using his name. It is repeated later on in two instances at the foot. One engaged in a puffery of the type Buick uses: “When better squeegees are made, Ettore Steccone will make them,” to point up his particular argument.

We submit that on the showing here the defendant is not guilty of any contemptuous attitude toward this Court’s judgment. I think in all fairness, considering the fact that he did not ignore the advice of counsel but sought it and sought it



in detail, and that is reflected in the expression of the opinion we have. We don't offer that as an excuse of conduct that is otherwise contemptuous, but I say this, that if a man faced with a judgment permissive in nature consults his counsel and his counsel gives what appears to be a faithful interpretation of the permissive language, that the Court should come rather cautiously to the harshness of a contempt ruling.

Perhaps some other approach should be made to it. And that was suggested to me by a remark made by opposing counsel that plaintiff is here asking that this Court amend its judgment to remove all possibility of confusion. If that is plaintiff's position, I submit a contempt hearing is not the way to do it, and the authorities support us on that, because very early the United States Supreme Court laid down this rule in *Terminal Railway Association vs. United States*, 266 U.S. 17, to the effect that "in contempt proceedings for the enforcement of a decree, the meaning of that decree will not be expanded by implication or inference beyond the fair meaning of what was intended to be prohibited in the light of the issues."

To the same effect is the very recent case in New York, *One-Two-Three Company, Inc., vs. Tavern Fruit Juice Co., Inc.*, 54 Fed. Supp. 574.

The Court: Have you those two cases in your memorandum?

Mr. Naylor: Yes, I have, your Honor.

There is a further tip-off that that may be plaintiff's intent and purpose rather than this contempt



when we refer to items 3 and 4 of plaintiff's prayer on the petition. They say, herein this Court is asked to "enter a further order enjoining defendant from use of the name 'Steccone' in any manner whatever in connection with squeegees and parts therefor"; and, that the defendant "instruct, in writing, his agents and distributors from in any manner using the name 'Steccone' in connection with the advertisements and sales of squeegees and parts therefor."

Well, I submit that the approach to that is not through contempt proceedings. I respectfully submit that on those authorities if the plaintiff is dissatisfied with your Honor's judgment there is appropriate procedure; but it most certainly is not in a contempt proceeding; and we do not think there is any merit in picking up the minutia of what Steccone has done in his advertising and ask to present the matter before the Court again in the hope that through contempt some amendment of the judgment may perforce come about.

So with those remarks we submit that there is no room for a contempt ruling in this particular proceeding.

The Court: All right.

Mr. Hursh: May it please your Honor, I see Mr. Steccone present in the courtroom. I would like to ask him a few questions if I might.

The Court: Have you any objection?

Mr. Naylor: I have no objection.

The Court: Go ahead and ask him.

Mr. Naylor: Will you take the stand, Mr. Steccone?

ETTORE G. STECCONE

defendant herein, called as a witness; sworn.

Direct Examination

By Mr. Hursh:

Q. What is your full name, sir?

A. Ettore G. Steccone.

Q. Mr. Steccone, I show you Exhibit 1 to the petition for order to show cause, which is a circular which advertises Steccone Master Squeegees. That was sold by Sterling Sanitary Supply Company?

A. Yes.

Q. Who had that circular printed?

A. I don't know. First time I saw the paper was when Mr. Peckham called me and told me that. "What do you mean?" He says—I can't recall the name—"Mr. Hursh called me and told me you published something, some kind of paper." I said, "No, this is a surprise to me." He said, "Do you know who could have done it?" I said, "No, I don't have no idea." He said, "See if you can get a copy." So I believe it was on—well, I am not sure, but this man came and brought one of those papers that are published in New York and where I saw that ad. Then I wrote to Sterlings and asked them to send me three copies, I wanted to see what he published; and one I gave Mr. Peckham and one I kept myself. But the only thing I knew about that ad was when Mr. Peckham called me up. And

(Testimony of Ettore G. Steccone.)

the second copy I seen, it—I don't know if it came through the Window Cleaner, they sent it to me or they send it to me, I don't know which, but I seen it after that, and after several weeks I received copy from Sterling. But I didn't have no knowledge whatsoever and Sterling never told me about advertising or anything.

Q. Do you contribute any money to Sterlings for advertising your squeegee?

A. No, sir, never a cent. They didn't ask it and I didn't give it.

Q. After you saw this advertisement did you contact Sterling and tell him that it was an improper advertisement of your product?

A. I didn't say that because I thought they were all right. I don't believe I considered that in that issue. I thought that was done and they wouldn't repeat that.

Q. Have you ever contacted any of your dealers, distributors or jobbers to tell them about this Court's decision at this trial?

Mr. Naylor: If the Court please, I am obliged to object because it improperly includes the jobbers, dealers——

The Court: Yes.

Mr. Hursh: I will change it.

Q. Did you ever notify your dealers with respect to the judgment?

A. I haven't no particular dealer. I sell to everybody. I send my price list to anybody to buy. But I haven't got a particular party that has more

(Testimony of Ettore G. Steccone.)

power than others, because I have no distributor to say, "Will you sell squeegees in this zone or that?" Everybody send an order, I got a discount sheet and I follow that, and then I haven't got no particular party to sell in certain territory.

Q. Who is this gentleman E. P. Gilsdorf?

A. Gilsdorf sells my product, but just to order.

Q. He is just a straight salesman?

A. Yes, but the order come to me. Solicit. But he don't sell my squeegee. He take order for me. Of course he doesn't do any advertising or anything like that. What I mean, I haven't a distributor, you know, handle material, handle the goods. I haven't got such a thing. Gilsdorf just takes order.

Q. How does Sterling purchase from you?

A. He buy according to my price list.

Q. He is not a distributor or agent of yours?

A. No. He buy. I got—I haven't got such thing. He buy according to my price list. If he send me large order, I give him according to the discount going. Suppose he got discount two gross, I give him discount two gross; suppose he got discount five gross, then I give him discount five gross.

Q. How do you deal with Pearl Brothers?

A. Same thing.

Q. Formula Products?

A. I never sold anything.

Q. Do you know whose squeegee rubbers are being advertised by the Formula Products of Newark, New Jersey?



(Testimony of Ettore G. Steccone.)

A. I never saw any squeegee. Might sell. Sell most all persons.

Q. From that advertisement in Exhibit 5 you can't tell whose squeegee rubbers they are? They could be yours?

A. They could be mine. I don't know.

Q. Tell me, have you since January 11, 1950, changed the markings or stampings on your squeegee handles in any manner? A. No, sir.

Mr. Naylor: If your Honor please, I would like to object to any line of examination such as this because this contempt proceeding is founded upon five pieces of advertising matter, and there isn't a word concerning markings in the papers.

The Court: I haven't examined them carefully, but that is the impression I have, it is founded on that advertising.

Mr. Naylor: Strictly that advertising, your Honor.

Mr. Hursh: In Paragraph 17 of the petition, the last sentence states here that: "That said advertising circulars, Exhibits 2 and 3, disclose the identical use of the name 'Steccone' on defendant's squeegee handle which was originally charged in the complaint to constitute unfair competition by the defendant and which this Court held to be unfair competition in its opinion and judgment. That the said continued use of the name 'Steccone' by defendant on his squeegee handles is in violation of this Court's judgment and constitutes unfair competition by defendant against plaintiff."



(Testimony of Ettore G. Steccone.)

That is a direct issue.

The Court: I will allow the question.

Mr. Hursh: What is that?

The Court: I will allow the question to be answered.

Mr. Hursh: I think it is proper, your Honor.

Q. What is your answer to the question?

A. You have to repeat the question.

Q. Since January 11, 1950, have you made any changes in the stampings or markings on your squeegee handles? A. No, sir.

Q. Is that exactly the same as it was prior to the entry of the Court's judgment?

A. Same.

Mr. Hursh: Those are the only questions I have of Mr. Steccone.

Mr. Naylor: No questions. Oh, I do have one question. I wish you would take the stand again. Mr. Reporter, may I have the last question by Mr. Hursh read back?

(Thereupon, the question was read by the reporter.)

#### Cross-Examination

By Mr. Naylor:

Q. Have you made any changes in the markings on your squeegees themselves? A. None.

Q. Or the rubber?

A. On the rubber I have, yes. Put Ettore Steccone.

Q. In other words, the squeegee rubber bears

(Testimony of Ettore G. Steccone.)

your full name, Ettore Steccone?           A. Yes.

Q. In other words, the head or handle bears a stamp which shows "Steccone Products Co., Master, Oakland, California," arranged in a circular, is that correct?           A. That is right.

Mr. Naylor: That is all.

Redirect Examination

By Mr. Hursh:

Q. Is there any other legend on your squeegee rubbers that distinguishes that rubber from the product of the Morse-Starrett Products Company?

A. No. I got my full name.

Mr. Hursh: That is all.

Mr. Naylor: That is all.

(Witness excused.)

Mr. Hursh: May it please your Honor, in answer to some of Mr. Naylor's statements I might say this, that at the conclusion of the trial plaintiff hoped it had been successful in the litigation, and that this type of advertising campaign, if permitted by the defendant, the plaintiff considers itself anything but successful.

Mr. Naylor stated he studied the authorities that appeared in one paragraph of your Honor's opinion, then he starts splitting hairs with respect to whether explanatory material and explanatory phrases are exactly the same. He interprets these five decisions that your Honor mentioned and

selects the most liberal ones in favor of his client, stating that there is a distinction between explanatory material and explanatory phrases.

I say this is merely a fiction, your Honor; that if the defendant wanted to be fair about this he would have considered all these authorities and he would have put an explanatory—I don't know whether you call it a material or a phrase, that has no connection with Morse-Starrett's Products Company. You can see from the Exhibit 5, the Window Cleaner for March-April, 1950, the value of the name "Steccone." "Genuine Steccone Rubber." Everybody uses it in the trade. You can't tell whose product it is. It has come to mean a good product. And it must be remembered the only person, or only entity that ever used the name "Steccone" as a trade-mark was the corporation. That was established during the trial, that the corporation had been the user and owner of that trade-mark and has a right to it.

The Court: I remember clearly what was in my mind at the time I rendered that decision. It is just as stated there, to the effect they could use the word "Steccone" in connection with some other word, provided they made it clear that it was not the product of Morse-Starrett Company. That was the idea that was in the back of my mind, that your people had gained a secondary right, secondary meaning of the word "Steccone."

Mr. Hursh: That was our interpretation of it, your Honor. I don't think they have followed that.

The Court: Personally, I feel—I am going to

look through them. I haven't read them over. My feeling now is those Exhibits 2, 3 and 4 are a palpable attempt to do as men do when they are selling prospectuses of stocks: put in something they don't want set down in small type at the bottom. I don't think even the language of that is the distinguishing language I wanted put on this squeegee and put in the advertising matter.

Secondly, Mr. Steccone has just admitted he hasn't changed any of it either on the squeegee or the handles, never put any explanatory remarks on there at all.

I will look it over, but I feel he hasn't in good faith attempted to comply with the order.

Mr. Naylor: If the Court please, may I correct one impression I think your Honor has, and that is that there has been no change in the markings.

The Court: He said there hadn't been.

Mr. Naylor: There has been as to the squeegee rubbers themselves.

The Court: But he put Ettore Steccone.

Mr. Naylor: He put his full name on the squeegees.

The Court: Yes, I have that in mind, but I don't think that is a complete change. I will take it under submission.

Mr. Hursh: Thank you, your Honor.

### CERTIFICATE OF REPORTER

I, Kenneth J. Peck, Official Reporter, certify that the foregoing transcript of 29 pages is a true and

correct transcript of the matter therein contained as reported by me and thereafter reduced to type-writing, to the best of my ability.

/s/ KENNETH J. PECK.

[Endorsed]: Filed Sept. 11, 1950.

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[Title of District Court and Cause.]

### MEMORANDUM OPINION

I find that exhibits 2, 3 and 4 attached to the affidavit of Leon Paul in support of plaintiff's claim that the defendant has not complied with the judgment of this Court are violative of that judgment. I do not make the same finding with respect to exhibits 1 and 5 attached to said affidavit, because the evidence indicates that these publications were not made by defendant but were made by dealers over whom this Court has no jurisdiction.

See *Tubular Heating & Ventilating Co. v. Mt. Vernon Furnace & Mfg. Co.*, 2 F. (2d) 982, 983.

I further find that defendant has not complied with the order of this Court requiring him to indicate on the squeegees and the handles thereof manufactured and sold by him that they are not the product of Morse-Starrett Products Co.

Accordingly it is Ordered that the defendant forthwith cease and desist from printing, circularizing or using in any manner whatsoever the said exhibits 2, 3 and 4, or substantial copies thereof, and furthermore that he forthwith cease and desist from manufacturing and selling any squeegees or handles



thereof marked with the word "Steccone" used alone, or in connection with other words or symbols which do not clearly indicate that they are not the product of the Morse-Starrett Products Co.

It is further Ordered that defendant pay to plaintiff a reasonable attorney's fee, to wit, the sum of \$500.00 for services of plaintiff's attorneys in the commencement and prosecution of said contempt proceedings.

Dated: July 31st, 1950.

/s/ HERBERT W. ERSKINE,  
United States District Judge.

[Endorsed]: Filed July 31, 1950.

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In the United States District Court, Northern  
District of California, Southern Division  
Civil Action No. 27081-E

MORSE-STARRETT PRODUCTS CO., a Corporation,

Plaintiff,

vs.

ETTORE G. STECCONE, an Individual, Doing  
Business Under the Firm Name and Style of  
STECcone PRODUCTS CO.

Defendant.

### ORDER FOR WRIT OF EXECUTION

The order to show cause for contempt having come on for hearing on July 26, 1950, on motion of

plaintiff, and the Court having entered on July 31, 1950, its order awarding reasonable attorneys' fees in the sum of Five Hundred Dollars (\$500.00) for services of plaintiff's attorneys in the commencement and prosecution of said contempt proceedings, and it appearing to the Court that said Order of July 31, 1950, has not been complied with in that the said sum of Five Hundred Dollars (\$500.00) has not been paid by plaintiff to defendant, it is hereby ordered that a Writ of Execution be issued by the Clerk of this Court to the Marshal of this Court instructing said Marshal to levy upon the personal property of defendant for the satisfaction of said order awarding said attorneys' fees.

/s/ HERBERT W. ERSKINE,  
United States District Judge.

Dated: October 6th, 1950.

[Endorsed]: Filed Oct. 6, 1950.

[Title of District Court and Cause.]

MOTIONS AND NOTICE OF MOTIONS TO  
RECALL, QUASH OR STAY WRIT OF  
EXECUTION, AND FOR ENTRY OF  
FINAL JUDGMENT

To Morse-Starrett Products Company, a Corporation and plaintiff above named, and to Messrs. Mellin, Hanscom & Hursh, Oscar A. Mellin, Le Roy Hanscom and Jack E. Hursh, its attorneys:

You and each of you, will please take notice that on Friday, October 13th, 1950, at 11 a.m. o'clock, or as soon thereafter as counsel can be heard, in the courtroom of the above-entitled court, in the United States Post Office and Courthouse Building, Seventh and Mission Streets, San Francisco, California, defendant will move this Honorable Court as follows:

1. To recall or quash or to stay the writ of execution heretofore issued herein, and
2. To approve a form of judgment and to thereafter direct and enter final judgment in this proceeding.

The grounds for these several motions are as follows:

A final decision or judgment within the meaning of the United States Code, Title 28, Sec. 1291, and according to the procedural requirements laid down by the appropriate Federal Rules of Civil Proce-

dure, and the local rules supplemental thereto, has not as yet been entered in this proceeding; and, no final decision or judgment having been entered, the issuance of writ of execution is premature and therefore improper.

Dated: October 9th, 1950.

NAYLOR and LASSAGNE,

JAS. M. NAYLOR,

By /s/ JAS. M. NAYLOR,

Attorneys for Defendant.

### ORDER SHORTENING TIME

Good cause appearing therefor, it is hereby

Ordered that the foregoing motion be and the same is hereby set for hearing before the above-entitled Court at 11 a.m. o'clock, on October 13th, 1950.

/s/ MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed Oct. 9, 1950.

[Title of District Court and Cause.]

MOTION TO RECALL, QUASH OR STAY  
WRIT OF EXECUTION, AND FOR EN-  
TRY OF FINAL JUDGMENT

Tuesday, October 23, 1950

Appearances:

For the Plaintiff:

MELLIN, HANSCOM & HURSH, by  
JACK E. HURSH, ESQ.

For the Defendant:

NAYLOR AND LASSAGNE, by  
JAMES M. NAYLOR, ESQ.

The Clerk: Morse-Starrett v. Steccone, motion to recall, quash or stay writ of execution, and for entry of final judgment.

Mr. Naylor: Ready.

Mr. Hursh: Ready.

Mr. Naylor: If the Court please, there are certain factual recitals which would be essential to your Honor's understanding of our position in this matter which unfortunately I did not have set up in affidavit form because opposing counsel's memorandum wasn't served until approximately four o'clock yesterday afternoon. I simply had not had adequate time to get those out.

This, as Your Honor will recall, is a motion to quash, recall or stay the writ of execution and for entry of a final judgment in the case of Morse-



Starrett v. Steccone. The position taken on behalf of the defendant Steccone in the motion is that the memorandum opinion as entered by the clerk of this court on July 31 was not a final order of an appealable nature. The reason that view was taken is the fact that under the R.C.P. rules and local rule No. 5, it was not felt, nor is it now felt that the memorandum itself meet all of the customary and conventional practices of this district with respect to its being a final order.

I would like to cite a chronology of dates from our own diary which I will tender as an offer of proof in that regard and supply affidavits or such other proof as the Court may direct to indicate what our understanding has always been from the inception, namely, July 31, down to date.

It so happens that I was away on vacation when your Honor handed down your memorandum opinion. I returned here on August 15 to find the memorandum, and then I learned that Your Honor was on vacation, and I understand Your Honor's vacation terminated about September 11. And on September 18 I left for the east on a deposition trip in another case, namely, Wolfe v. National Lead.

Despite my own personal absence from the office the matter has not been unattended to, as the diary notes I want to recite will amply illustrate, and as I said before, those entries illustrate our understanding of what Your Honor intended by the memorandum opinion from the standpoint of finality.

The diary shows that on August 2 Mr. Lassagne, who is my partner, consulted with Mr. Steccone

relative to the memorandum opinion and received from him verbal instructions to appeal.

On August 3, Mr. Neil of our office had two phone conversations with the clerk concerning the nature of the entry which had been made. And at that point, in all fairness to the clerk and in all fairness to ourselves, I would like to say that there commenced an understanding in that conversation and subsequent conversations with the clerk that your Honor's memorandum opinion wasn't regarded by the clerk as a final order.

We asked at that time of the deputy if they would be so kind as to make a notation to advise us promptly should any further entry be made on his docket with respect to a final order in the particular matter.

On August 4 there was a report on the memorandum opinion, written report, and in that it was asserted that there was need for entry of judgment to open the appeal period with respect to His Honor's memorandum opinion.

The Court: Who made that report?

Mr. Naylor: Mr. Lassagne made that report in my absence.

The Court: I see.

Mr. Naylor: On August 4 Mr. Lassagne declared Steccone's intent to appeal to Mr. Hursh in a phone conversation, and I mention that merely to indicate the chronology of these events and the intent which we have had on our side, in accordance with the understandings we have had with the clerk's office and our understanding of the law.

On August 31 I personally came out to the court and checked the nature of the entry which had been made with respect to Your Honor's memorandum opinion. I have here and I recite it in the motion, or the memorandum, the entry as I then understood it. Now, Mr. Hursh has called attention in his reply memorandum here to the fact that there are actually two entries on July 31. At no time was either Mr. Lassagne or Mr. Neil or myself informed that there was an entry above the line which began: "Filed memo opinion of court that defendants cease and desist from circularizing certain printed circulars; manufacture and selling improperly marked squeegees and handles and pay plaintiff's attorney \$500 fees."

I would like to say and I repeat emphatically, at no time I have checked this finding with Mr. Lassagne or Mr. Neil did we have any understanding that there was a double entry there. Again, I have had time to rationalize that to the extent of determining whether that would have altered our course. I am not certain yet whether the first of the two entries of July 31 had a significance because of certain other factors to which I will allude, but the fact remains is we were just not given the understanding that the earlier entry was there. We relied simply on the information that the memorandum opinion had been filed and was—the August 1 entry is that a copy of the opinion had been mailed to counsel.

On September 5 there was a further report to Steccone that there was no further entry beyond

the memorandum opinion and there was a detailed procedure under local rule 5 on the settlement of findings, conclusions and judgment, and alternate procedure under our CF 52-B with reference to the amendment of the findings, and R.C.P., 59-E to alter and amend the judgment.

On September 19 there was still a further report, no further entry beyond memo, and set the matter ahead for October 5 to call plaintiff's counsel to ask whether they proposed to submit a form of judgment; if not, then we were to prepare and submit one of our own under local rule 5.

On October 3 Mr. Neil of our office made a phone call here to the court and discussed the status of the docket as of that date and gathered the understanding that there was no change.

Now, I want to be perfectly clear with the clerk's office. I have been practicing here twenty years and have not had the slightest difficulty, find it a very fine clerk's office, and at the present time, in all respects. I think to rationalize the understanding that we got we must take the sequential entries on his docket and say that whoever inquired would be referred to the last entry, which shows in this particular case ahead of context in that it recited the memorandum opinion was filed July 31. Normally I think in fairness the order would come after the memorandum.

On October 9 I came out again, made a trip to the court to check the clerk's entry on the memorandum opinion, and as I say, received nothing to indicate that there had been a greater finality than



that which existed on July 31 when that memorandum opinion was entered.

Now, there was a subsequent development on this record which has, I think, a direct bearing on the understanding which apparently the clerk was harboring and certainly the understanding that we were under, namely, Your Honor's order of October 6, which was for a writ of execution. That order, as Your Honor will recall, **recited**:

“The order to show cause for contempt having come on for hearing on July 26, 1950, on motion of plaintiff, and the court having entered on July 31, 1950, its order awarding reasonable attorneys' fees in the sum of \$500 for services of plaintiff's attorneys in the commencement and prosecution of said contempt proceedings, and it appearing to the court that said order of July 31, 1950, has not been complied with in that the said sum of \$500 has not been paid by plaintiff to defendant, it is hereby ordered that a Writ of execution be issued by the clerk of this court to the marshal of this court instructing said marshal to levy upon the personal property of defendant for the satisfaction of said order awarding said attorneys' fees.”

Now, we submit, Your Honor, that if the original memorandum opinion as treated by the court, as treated by the clerk in his understanding of the court's intention was in fact a final order, then we have no explanation of why it was necessary on



October 6 to enter an order specifically directing the clerk to do that which would have already been contained in the final order if the earlier entry was in fact a final order.

Now, as I said to Your Honor in chambers, when this motion was set on Your Honor's calendar, and I will repeat it here, we have no intent to dally with the court in this matter. There was a declared intent on Steccone's part to appeal from Your Honor's memorandum opinion, if that be treated as a final order for one specific purpose only; namely, to test the propriety of a contempt order, clarifying or treating an original final judgment so as to amend it or to amplify it or to do any of the things which cast a different light on it. I submit in good faith to Your Honor that that was discussed at great length with Steccone, and there is some Supreme Court law which indicates that the ground for appeal would be there, and so it was the intent at all times after that was handed down to take that appeal, and so that is the reason why we are here today, not to have the door slammed in our faces on the right to appeal, to test the correctness of that particular memorandum as it dealt with the original judgment in the case.

The decisions which we have cited and the decisions which our opponents have cited stand for the proposition that the finality of an order always involves the question of the intent of the district judge.

There is a case on page 4 of the defendant's

memorandum for that proposition. We have some in our own memorandum.

“The question of finality of a decision is not one of form but one of substance based primarily on the act and intent of the district judge.”

Now, we submit that it was certainly not our understanding from a reading of the memorandum opinion and the subsequent treatment of it by the clerk, and the subsequent issuance of the order for writ of execution that the original memorandum was intended to be a final order, regarding it in the light of local rule 5 and the practice which has prevailed or of implementing an order of that kind or decision of that kind by findings, conclusions, and a judgment.

We have on this motion tendered to Your Honor a motion—I mean, a form of findings, a form of conclusions and a form of judgment which we think would make the type of final entry on the contempt proceedings which is contemplated by local rule 5 and the R.C.P. rules, as well as the established practice in this district, and it would be on the basis of such a final judgment that an appeal would lie.

As I said before, we are perfectly prepared to augment any remarks I have made here by affidavits if Your Honor feels they should be added.

The Court: I think I have them well in mind, unless you want to file an affidavit in order to have your position made clear in the record.

Mr. Naylor: I will be happy to do it if——

The Court: File a statement of the transcript which you just said.

Mr. Naylor: But I would make that as an offer of proof in that regard.

The Court: I was unaware of the fact that there was any provision for findings and conclusions of law in connection with the violation of a contempt proceeding, based upon an alleged violation of the order of the court. I really intended that order to be final; I didn't expect it to have any findings proposed upon that order. I want to say to you it may have been ignorance on my part, but I have been here only about a year and a half and this is the first contempt matter that has come before me and I didn't realize that it had to be supported by findings of fact and conclusions of law.

Mr. Naylor: Well, we didn't contact Your Honor in chambers, Your Honor was away on vacation, couldn't contact you in court, merely relied on what the court did, and as I say, with all fairness to the clerk, was the understanding we had, was that they were in fact waiting for something more, and then the order for the writ of execution. I don't know all of the circumstances behind that, but I gathered that Mr. Calbreath's office felt his record was not in such shape that he could go ahead and issue a writ of execution without such an order. As I say, it has been our intent to take these steps—as a matter of fact, I have here the whole format of the appeal papers, including even the application for supersedeas bond. They were all prepared in the early part of August and simply held in

status quo in the file awaiting such time as there would be a final entry such as would commence the running of a time for appeal.

The Court: Have you got a copy of the memorandum of the court there?

Mr. Naylor: Yes, I have.

The Court: I can't find it. I have it.

Mr. Naylor: You have one, Your Honor.

The Court: Yes.

Md. Hursh: Your Honor want a copy of it?

The Court: I have it right here. What have you to say?

Mr. Hursh: May it please Your Honor, there is one point that I don't think has been made clear to Your Honor and that is that on the court's docket of this case on July 31 there appears this notation:

"Order defendants cease and desist from circularizing certain printed circulars; manufacturing and selling improperly marked squeegees and handles and pay to plaintiff's attorneys \$500 fees."

Now, that is the way the court's docket is set up, and then after that entry on July 31 is the entry paper No. 66, I believe it is, memorandum opinion, filed, orders so and so. So as a matter of fact on this court's record there is an order of the court which is a final appealable order. Irrespective of whether the memorandum opinion, whether titled memorandum opinion or judgment or order or whatever it is entitled, irrespective of that question there is an additional order on the court's docket



that is a final, appealable order, and I mean that is all that determines the right of the defendant to appeal. Whether on the docket of this court in this case there is an order, that under the statute, 28 USCA 1291, is a final decision of the district court.

Our understanding of the court order was that Your Honor had completed his deliberation of our petition for contempt. There is nothing further for the parties to do with regard to that petition, there is nothing further for this court to do with respect to that petition. Every question that we had raised had either been granted to us in our prayer, the court either granted what we wanted or denied our prayer, but those things were not mentioned in the court's order. Naturally we presumed they were denied, this question of clarification of the court's previous decision, naturally we prayed for that, but the court did not grant us that relief, so it was denied, and there is no question about that.

I think the argument of counsel in that regard is purely fallacious. I do not believe there is any provision, and I have not been able to find anything in the—anything on the question where it is necessary for this court to enter findings of fact and conclusions of law and judgment in a contempt proceeding. I think the court's order holding contempt is surely sufficient and the order as entered even—we contend that even the entry of the memorandum opinion where the order is so clearly expressed by Your Honor as to what he considered to be the contempt of the defendant and what relief the plaintiff was to get, but we think counsel—first,



we think that that entry in and of itself was an entry which was appealable. But in addition to that entry there is this previous entry that very, very clearly determines the rights of the parties in this case and is appealable. And the defendants, if they desire to appeal, had their right to appeal, and that time has now expired. The only question now is whether the defendant can appeal in this case. What they want to do is to have this court perform an idle act of entering or making findings and conclusions of law in entering a judgment.

The Court: Has the time to appeal from that order, if it is to be regarded as the order of the court, has that expired?

Mr. Hursh: Yes, that is right, that has expired, and in addition to that, Your Honor, the rule provides as follows, the rule, the approved amendment to rule 77, subsection d, in the last sentence it states the following. We contend that irrespective of what this rule provides, we contend that the clerk, by giving to defendant's counsel, as he has admitted this morning, on August 2 the same as our office, we received a copy of the memorandum opinion, and we knew by receipt of that copy that there was an entry in the clerk's docket with respect to that memorandum opinion and order of court.

Now, the rule provides as amended:

“Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for

failure to appeal within the time allowed, except as permitted in rule 73(a).”

Referring to Rule 73(a), we find that it provides as follows:

“a. When and how taken. When an appeal is permitted by law from a district court to a court of appeals, the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed.”

So we contend that even if there has been a lack of the clerk to give notice of this prior entry on July 31, the time that this court could extend the appeal has also expired.

Now, turning to what a judgment is, rule 54(a) states:

“Definition: Form. ‘Judgment’ as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.”

So that no matter what it is called, if it is called an order or a judgment or a memorandum opinion, if it is an order from which an appeal lies, their time to appeal starts from the entry of that order. There is no question in this case that this court's memorandum opinion had appended thereto the court's order with respect to the contempt which finally determined all the issues of these parties on this application for order to show cause for contempt.

Your Honor ruled that the defendant, which is in contempt with respect to certain issues, was not in contempt with respect to other issues, and ordered that counsel fees for \$500 be paid to the plaintiff by the defendant. There can be no question but that is a final order and an entry by the clerk in the docket and the appeal began to run. We understood it. I did not telephone Mr. Lassagne, I do not know the exact date, but I assume Mr. Neil was informed—I telephoned Mr. Lassagne, I asked him when Mr. Steccone was going to pay the counsel's fees. He said, "We are appealing." That was the extent of the conversation. Naturally, we presumed that they were appealing within the 30 days of the entry of the order.

The Court: What is rule 5?

Mr. Hursh: Rule 5 is quite a long rule, Your Honor. Rule 5 on entry of judgment and orders states—this is subdivision C:

"The notation of judgments and orders in the civil docket by the clerk shall in all cases be made at the earliest practicable time. The

notation of judgments will not be delayed pending taxation of costs, but a blank space may be left in the form of judgment for insertion of costs by the clerk after taxation.

“(2) Orders and judgments under subdivision (A) and (B) of this rule will be noted in the civil docket immediately after the clerk has signed them. The clerk may require any party obtaining a judgment or order which does not need to be approved as to form by the judge, to supply him with a draft thereof.”

(4)—skipping (3) which I don't think is applicable to anything here——

“(4) Every order and judgment shall be filed in the clerk's office. Where the clerk has requested a draft, or where the form of an order or judgment has been settled by the court, a copy must also be delivered to the clerk for addition to the civil order book.

“(D) Settlement of orders and judgments by the court. Within five days of the decision of the court giving any order which requires settlement and approval as to form,”

Now, we state that this order didn't require any such settlement and approval of the court because it was the court's final order.

“the prevailing party shall prepare a draft of the order or judgment embodying the court's decision and present it for approval to each party who has appeared in the action. Each party shall examine it at once, and if he



aproves, endorse with the words, 'Approved as to form, as provided in rule 5(D),' and append his signature thereto. Such endorsement shall not affect the rights of any party, but shall be considered only as an indication to the judge that the form is correct. If any party does not approve, he shall endorse with the words, 'Not approved as to form, as provided in rule 5(D),' specifying his reasons. The party proposing the order or judgment shall thereupon serve a copy upon each other party, and lodge the original and one copy with the clerk. Each party who disapproves the order or judgment shall have five days within which to serve and lodge with the clerk proposed modifications thereof. If all parties approve, or if no modifications are presented within said five days, the order or judgment, if approved by the judge, shall be signed and filed by him. If any proposed modifications of the order or judgment are presented as herein provided, the judge shall order such modifications made as he deems proper. If the attorney for the prevailing party fails to observe the above provisions, any attorney in the case may submit to the judge a draft of the proposed order or judgment.

“(e) Findings of fact and conclusions of law. Within five days after receipt of written notice of an opinion or memorandum order for judgment, the prevailing party shall prepare a draft of the findings of fact and conclusions of



law and lodge them with the clerk, serving a copy on the adverse party, who may within five days thereafter file with the clerk and serve upon the prevailing party his proposed amendments. If the adverse party proposes no amendments he may endorse his approval on the original draft, which may then be presented immediately to the judge for his signature.”

We said that findings were not specified by Your Honor and are not necessary in this case. There was no rule provided, there has to be findings in a contempt proceeding unless Your Honor had specified at the bottom of his order, “Plaintiff shall prepare findings and present them in accordance with the rule of this court.” They are unnecessary.

The Court: That was what I just said, I have never been aware that in a contempt proceeding it was necessary to file findings and conclusions of law, the same as you would on an original judgment.

Mr. Hursh: That is our understanding, too, that it is merely finding contempt or not finding contempt.

The Court: If I can I want to give any litigant before me a chance to appeal from my decision, but still I felt that this was just my final word on the subject; I had no idea that any findings should be filed and conclusions of law should be filed, or any special judgment filed. The order, as I read it, shows that on its face.

Mr. Hursh: I mean, that was our understand-

ing also, Your Honor, that the order was final, nothing further to be done. Your Honor had decided the question, contempt was found and nothing further whatsoever was left to be done here by the court or by the parties, and if an appeal was to be taken, the appeal was to be taken from the clerk as entered by Your Honor.

The Court: I made certain findings in this opinion, was improperly called an opinion; I made certain findings in it and then I go on and say it is ordered, accordingly it is ordered, it is further ordered that the defendant pay to the plaintiff, and so forth. Those are outright orders, but nothing in the memorandum to prepare findings and a judgment.

Mr. Hursh: That is right, there is nothing conditional whatever about Your Honor's order, completely final and determines the rights of the parties. We submit that the time to appeal started to run from the entry of that order by the clerk's office and it was properly entered by the clerk's office and the defendant had notice of the entry, and we state that the time to appeal has lapsed, nothing that can be done. We submit, Your Honor, that they had their right to appeal, the time has elapsed and nothing can be done to bring that right back, even under rule——

The Court: 73.

Mr. Hursh: 73, that the time has expired.

The Court: If the matter had come before me under an application under rule 73, and the time hadn't expired, I would grant them the extension.

Mr. Hursh: Which is just what happened.

The Court: That time expired too, hasn't it?

Mr. Naylor: That is correct, Your Honor. I would like to make just one or two comments here with respect to the clerk's notice of the entry of a judgment as required by rule 77b. We do not stand on the proposition that Your Honor has still some time left because the clerk did not send that which was specifically identified as a notice of entry of judgment. We cite that proposition for this law, namely, that as the cases indicate the fact that such a notice was not sent may be taken as an indication of the understanding of intent to be gained from the particular thing which was filed with the clerk, and that is our position precisely on that.

Now, in response to Mr. Hursh's observations that there was a decree, or a final decree, or a finality in that which is entered on July 31, that still doesn't explain why it was necessary for Mr. Hursh to come back and apply to this court for a writ of execution or an order directing the issuance of a writ of execution. If that which was already on file was the final thing that was to be sent to the clerk on the proposition——

The Court: May have been because the fact that the clerk——

Mr. Hursh: That is a fact, I talked to Mr. Calbreath and he said, "I have to have an order of court directing me to issue a writ of execution." In compliance with his request I brought the order and

filed it with the clerk's office and the writ was filed. No mystery about it at all.

Mr. Naylor: I am not trying to create a mystery. I am not informed, I wasn't there, it was *ex parte*, but the point I would like to make is this, a further point, that we have done considerable research on this question of final orders and we have been unable to find any authorities that say that contempt proceedings are strange proceedings in the sense that findings, conclusions and judgment would not be required, so if we take that understanding of the law, in reading local rule 5, and taking the custom of this court extending back over a period of time way beyond the present R.C.P. rules, we come up with the proposition that Your Honor's memorandum opinion was the nature of a thing which under the rules required some implementation. And there is a further reason for that viewpoint, namely, that as we say Your Honor's memorandum opinion acts upon the original judgment in the case in a respect which brings a clarification of what Your Honor's original intent was, which is a further reason for delineation of the findings and delineations of conclusions and the eventual expression of Your Honor's final view in a judgment based on such a conclusion and findings.

And it seems to us that when this whole record is looked at we find not only in the memorandum itself, but—or in the clerk's attitude toward it, but in the attitude of counsel in coming back to get an order directing a writ of execution, that there is a



whole chain of things indicating that a plurality of people, including ourselves, had an understanding, a definite understanding as to what Your Honor's intent was, namely, that something further was to be entered before any time for appeal would start to run.

Now, I have disliked to bring in my own personal problem to the court, but our feeling of this is simply this: that if we are having the door shut upon us in a situation like this we will personally be out of pocket for the appeal up to the Ninth Circuit for clarification, and naturally, Your Honor, call it selfish what we will, we don't like to assume that burden, but we do not feel that that is an expense out of pocket of services or otherwise which can be visited upon this defendant.

The Court: I don't like to see anything like that visited on any attorney, although in the course of my practice of law I made mistakes and had to pay for them, either mistakes or things have been overlooked. We all, in busy practice, do that.

Mr. Naylor: That is true, we try to avoid them and minimize them.

The Court: That's why you should carry this insurance.

I will say frankly to you my intent was that that was the end of this thing so far as I was concerned. Now, you say there is a practice out here in this court with respect to preparation of findings, conclusions of law and in an order for contempt?

Mr. Naylor: I don't represent that I know of



any particular instance wherein in the past history of this court that this particular point has been raised and decided. That is not my representation, but my representation is that under rule 5 we take it for granted that when an order, when a decision has been reached, that it will be implemented in the manner in which rule 5 calls for, and the authorities that we have been able to run down don't characterize a contempt proceeding as any hybrid or peculiar sort of proceeding which would take them out of rule 5. That is our point plainly and simply.

The Court: A contempt proceeding without making any written order at all, just tell the clerk to enter a minute order that I find a man personally in contempt, fine him so much money and something like that.

Mr. Naylor: I think it depends on the nature of the contempt. If it were a court room contempt, I don't think there is any question, Your Honor would enter a minute order, but here in the matter, actually here it is in the nature of a supplemental proceeding, that is in the nature of a supplemental pleadings, and as a matter of fact Mr. Hursh has referred to the fact they prayed for something more than contempt, namely, a supplement of Your Honor's original judgment. You remember that point was discussed.

The Court: Yes, I think I refused to give it.

Mr. Naylor: That is true, that is true, but I think the refusal was in the matter of form, but not substance.

The Court: Was an appeal taken from the original judgment?

Mr. Naylor: No, it was not, and the reason there was that we felt that we had a clear definition in Your Honor's judgment based on findings and conclusions in the early antecedent proceedings as to what was a permissible course of conduct, and there Your Honor indicated that you had a certain definite intent. I remember that expression being used in the contempt proceedings, and there we misinterpreted Your Honor's intent there with respect to the type of marking that was to be put on these articles.

But I think this is not a question of any extension of the time for appeal, I think it is clarification of that which was entered on the clerk's docket as of July 31 where at least three different sources had a different interpretation than Your Honor now declares. Of course, the finality, the one of intent, that is now the matter that is raised.

The Court: I will look into the authorities on the thing. I would like to relieve you, but if you think, and the matter depends on what my intent was originally, then really I am stultifying myself and reversing and changing my intent by——

Mr. Naylor: I appreciate Your Honor's position in that regard, but I do say this:——

The Court: Intended to enter a judgment as I did, as I thought I did. The mere fact that it was a memorandum, or marked memorandum of opinion doesn't seem to me it ought to change the effect on the docket. A rose by any other name would smell

as sweet. I say I order this and I order that. I would like, however, to relieve you, particularly if it is going to be an out of the pocket cost to you, but I know how lawyers feel about that—I was a lawyer myself.

Mr. Naylor: I mentioned it because I knew Your Honor would appreciate our position here. We feel that we should take that responsibility.

Mr. Hursh: I don't understand what Mr. Naylor is saying, he doesn't want to appeal, because if there was any appeal from that it would be on behalf of the plaintiff, he wants an interpretation of Your Honor's first opinion.

Mr. Naylor: No, the findings, clarification of those.

The Court: He feels that the decision made on the contempt proceedings constituted a broadening of the judgment and therefore he would like to appeal from it to get the proper construction from the other court.

Mr. Naylor: That is it precisely.

The Court: In other words, as I understand Mr. Naylor, they misconstrued the language of that opinion and of those findings upon which the original judgment was based.

Mr. Hursh: I mean——

The Court: That they did not construe them the way I did and therefore they were willing to get a clarification from the order that I made, that I made in the contempt proceedings. That is the primary proposition.

Mr. Hursh: We naturally thought Your Honor's original memorandum opinion was clear, that defendant was not to use the name "Steccone" unless it was pointed out it was not in connection with the Morse-Starrett Products Co. That is exactly what he violated and the court's original memorandum opinion and the judgment—those he used many, many times, because the exhibits that we presented to Your Honor in the contempt proceedings, the name Steccone was used without any qualifying statement to show where those products originated.

The Court: Well, I am just clarifying to you——

Mr. Hursh: Yes, Your Honor.

The Court: ——Mr. Naylor's point of view.

Mr. Neil: May I say something at this juncture? It seems to me that Your Honor is laying rather considerable stress on the word "intent" and I would like to clarify that particular word in its meaning. In this problem of determining whether there was a final decision, I think that intent should be determined objectively. In other words, whether there was a final decision or not is a matter of substance and not form and the intent of the judge is important, but that intent is to be determined or gathered from the record as a whole, illumined by local practice and thus objectively determined rather than, perhaps, subjectively. Just offered to mention that.

The Court: I see what you mean. I will review these documents.



## Certificate of Reporter

I, Official Reporter, and Official Reporter pro tem, certify that the foregoing transcript of 27 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ RUSSELL D. NORTON.

[Endorsed]: Filed Dec. 13, 1950.

---

[Title of District Court and Cause.]

## NOTICE

To: Messrs. Mellin, Hanscom & Hursh, Attorneys,  
79 Post Street, San Francisco, Calif.

Mr. I. M. Peckham, Attorney, 405 Montgomery,  
San Francisco, Calif.

Messrs. Naylor & Lassagne, Attorneys, 420  
Russ Building, San Francisco, Calif.

You Are Hereby Notified that on November 9, 1950, Judge Herbert W. Erskine denied the defendant's motions to recall, quash or stay writ of execution and for entry of final judgment, in the captioned case.

C. W. CALBREATH,

Clerk, U. S. District Court.

mpb

San Francisco, California,

Nov. 10, 1950.



[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice is Hereby Given that Ettore G. Steccone, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the denial of defendant's motions to recall, quash or stay writ of execution and for entry of final judgment, said denial having been entered in this action on the 10th day of November, 1950.

NAYLOR AND LASSAGNE,

By /s/ JAS. M. NAYLOR,

Attorneys for Defendant.

[Endorsed]: Filed Nov. 13, 1950.

---

[Title of District Court and Cause.]

### DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Appellant designates the following portions of the record, proceedings and evidence to be contained in the record on appeal:

1. The judgment filed on January 11, 1950, in the original proceeding between these parties.
2. Petition for Order to show cause, filed July 20, 1950.
3. Order to show cause, filed July 20, 1950.

4. Affidavit of Ettore G. Steccone in opposition to Order to Show Cause.

5. Affidavit of E. P. Gilsdorf on Order to Show Cause.

6. Memorandum Opinion dated July 31, 1950.

7. Copy of Civil Docket page showing history of Civil Action 27081 subsequent to original judgment.

8. Order for writ of execution.

9. Defendant's motion to recall, quash or stay writ of execution, and for entry of final judgment.

10. Transcript of hearing on defendant's motion.

11. Notice of denial of defendant's motion.

Dated: November 15, 1950.

NAYLOR and LASSAGNE.

By /s/ JAS. M. NAYLOR,  
Attorneys for Defendant.

[Endorsed]: Filed November 17, 1950.

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[Title of District Court and Cause.]

APPELLEE'S COUNTER-DESIGNATION OF  
CONTENTS OF RECORD ON APPEAL

Appellee designates the following additional portions of the record, proceedings and evidence to be contained in the record on appeal:

(1) Findings of Fact and Conclusions of Law.

(2) Affidavit of Leon Paul dated July 19, 1950.

(3) Transcript of Hearing on Order to Show Cause.

(4) Appellee's Counter-Designation of Contents of Record on Appeal.

Dated: December 26, 1950.

MELLIN, HANSCOM &  
HURSH.

By /s/ JACK E. HURSH,  
Attorneys for Plaintiff.

Receipt of Copy Acknowledged.

[Endorsed]: Filed December 27, 1950.

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[Title of District Court and Cause.]

DOCKET ENTRIES

1950 (No.)

Jan. 11—54 Filed Findings of Fact and Conclusions of Law. (Erskine)

Jan. 11—55 Filed Judgment, Pltff. owner of trade name "Steccone" dismissing cross-complaint, writ of injunction to issue v. deft. and plaintiff to recover costs. Execution awarded. (Erskine)

Jan. 11— Ord. findings of fact, conclusions of law and judgment entered in favor of Pltff. vs. deft. for injunction. (Erskine)

Jan. 12— Mailed notices.

1950 (No.)

- Jan. 13—56 Filed notice of taxing costs Jan. 17, 1950, 9:30 a.m.
- Jan. 13—57 Filed cost bill by plaintiff. (\$138.00)
- Jan. 17— Taxed costs at \$138.00, 9:40 a.m.
- Mar. 17—58 Filed satisfaction of judgment by plaintiff.
- July 20—59 Filed petition of plttf. for order to show cause.
- July 20—60 Filed affidavit of Leon Paul in support of petition for order to show cause.
- July 20—61 Filed Order to show cause v. deft. for hearing July 26, 1950 at 10:00 a.m. (Erskine)
- July 22—62 Filed copy order to show cause, executed July 20, 1950.
- July 26— Hearing on order to show cause. Arguments heard, and cause submitted. (Erksine)
- July 26—63 Filed deft's; points and authorities in opposition to order to show cause.
- July 26—64 Filed affidavit of Gilsdorf.
- July 26—65 Filed affidavit of Steccone.
- July 31— Ord. deft. cease and desist from circularizing cert. printed circulars and manufacturing and selling improperly marked squeegees and handles and pay to plttf's. atty. \$500.00 atty. fees. (Erskine)

1950 (No.)

- July 31—66 Filed memo. opinion of court that deft. cease and desist from circularizing certain printed circulars; mfg. and selling improperly marked squeegees and handles and pay plttf's atty. \$500.00. (Erskine)
- Aug. 1— Mailed copies of opinion to counsel.
- Sept. 11—67 Filed reporter's transcript of proceedings of July 26, 1950.
- Oct. 6—68 Filed order for writ of execution. (Erskine)
- Oct. 6— Issued execution.
- Oct. 9— Filed motion and notice by deft. to set aside execution and for stay of judgment, Oct. 13, 1950, before Erskine, with memo., of points and authorities and order shortening time. (Roche)
- Oct. 9— Lodged findings and conclusions.
- Oct. 9— Lodged judgment.
- Oct. 12— Ord. motion to recall, quash, stay execution and for entry of judgment cont'd to Oct. 24, 1950. (Erksine)
- Oct. 12—70 Filed stip. and ord. cont. hearing on motions to recall, quash or stay and for entry of judgment to Oct. 24, 1950. (Erksine)
- Oct. 16—71 Filed ack. of service of motion, order and memo.
- Oct. 23—72 Filed memo. of points and authorities in opposition to motion for entry of final judgment.



1950 (No.)

- Oct. 24— Hearing. Ord. motions of deft. to recall, quash and stay execution heretofore issued herein and for entry of judgment of contempt be submitted for consideration and decision. (Erskine)
- Nov. 9— Ord. motions to recall writ of execution and for entry of final judgment, each denied. (Erskine)
- Nov. 10— Mailed notices.
- Nov. 13—73 Filed notice of appeal by deft. 5.00
- Nov. 13—74 Filed order granting suersedeas in sum \$750.00. (Erskine)
- Nov. 14— Mailed notices.
- Nov. 17—75 Filed supersedeas bond in sum \$750.00. "Approved, Herbert W. Erskine, U. S. District Judge."
- Nov. 17—76 Filed appellant's designation of record on appeal.
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[Title of District Court and Cause.]

### CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in this Court in the above-entitled case,

and that they constitute the Record on Appeal herein, as designated by the Attorneys for the Appellant, and I further certify that there is included a copy of certain entries from the Civil Docket relating to this case, to wit:

Judgment

Petition for Order to Show Cause Including Exhibits 1, 2, 3, 4 & 5

Order to Show Cause

Affidavit of E. P. Gilsdorf on Order to Show Cause

Affidavit of Ettore G. Steccone in Opposition to Order to Show Cause—Including Exhibits A, B, C, D, E & F

Memorandum Opinion

Order for Writ of Execution

Motions and Notice of Motions to Recall, Quash or Stay Writ of Execution, and for Entry of Final Judgment

Notice of Denial of Defendant's Motions

Notice of Appeal

Designation of Contents of Record on Appeal

Copy of docket entries from the Civil Docket showing history of this action subsequent to original judgment—from January 11, 1950, to date.

Reporter's Transcript for October 23, 1950—Motion to Recall, Quash or Stay Writ of Execution, and for Entry of Final Judgment.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at

San Francisco, California, this 14th day of December, A.D. 1950.

[Seal]

C. W. CALBREATH,  
Clerk,

By /s/ M. E. VAN BUREN,  
Deputy Clerk.

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[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO  
SUPPLEMENTAL RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in this Court, in the above-entitled case, and that they constitute the Supplemental Record on Appeal herein, as designated by the Plaintiff, to wit:

Findings of Fact and Conclusions of Law  
Affidavit of Leon Paul

Reporter's Transcript for July 26, 1950

Appellee's Counter-Designation of Contents of  
Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at

San Francisco, California, this 29th day of December, A.D. 1950.

[Seal]                      C. W. CALBREATH,  
Clerk,

By /s/ M. E. VAN BUREN,  
Deputy Clerk.

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[Endorsed]: No. 12770. United States Court of Appeals for the Ninth Circuit. Ettore G. Steccone, an individual doing business under the firm name and style of Steccone Products Co., Appellant, vs. Morse-Starrett Products Co., a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed December 29, 1950.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals  
For the Ninth Circuit  
Appeal No. 12770

ETTORE G. STECCONE, an Individual Doing  
Business Under the Firm Name and Style of  
STECCONE PRODUCTS CO.,

Appellant,

vs.

MORSE-STARRETT PRODUCTS CO., a Corpo-  
ration,

Appellee.

### NOTICE OF MOTION

To Ettore G. Steccone, appellant, and to Naylor &  
Lassagne, his attorneys:

You and Each of You Will Please Take Notice  
that appellee will bring on for hearing before the  
Honorable United States Court of Appeals for the  
Ninth Circuit, its Motion to Dismiss Appeal on the  
19th day of February, 1951, at the chambers of said  
Court, Post Office Building, Seventh and Mission  
Streets, San Francisco, California, at the hour of  
10:00 a.m., or as soon thereafter as counsel can be  
heard.

MELLIN, HANSCOM &  
HURSH,

By /s/ JACK E. HURSH,  
Attorneys for Appellee.

Receipt of Copy acknowledged.

[Endorsed]: Filed Feb. 13, 1951.



[Title of Court of Appeals and Cause.]

MOTION TO DISMISS APPEAL

Comes Now Appellee Morse-Starrett Products Co. and Moves to dismiss this appeal. The grounds on which this motion is based are as follows:

1. From the face of the Statement of Points filed by appellant, this Court has no jurisdiction.

2. Notwithstanding the Statement of Points on which appellant intends to rely on appeal, this Court has no jurisdiction of this appeal because a Final Order was entered in the District Court on July 31, 1950; said Final Order was an appealable order and appellant failed to file a Notice of Appeal within the time set forth for such notice in the Federal Rules of Civil Procedure.

MELLIN, HANSCOM &  
HURSH,

By /s/ JACK E. HURSH,  
Attorneys for Appellee.

Receipt of Copy acknowledged.

[Endorsed]: Filed Feb. 13, 1951.

[Title of Court of Appeals and Cause.]

MEMORANDUM IN OPPOSITION TO  
MOTION TO DISMISS

Appellee's Motion to Dismiss this appeal should be summarily denied by this Court. If appellee's motion is truly a motion to dismiss, then the motion is totally unsupported by any authority cited in appellee's brief. On the other hand, if the authorities cited by the appellee are germane to the issues which appellee seeks to bring before this Court, then the motion to dismiss is miscaptioned and appellee's brief is premature in that it is directed to the merits of the appeal which will be considered by this Court after the motion to dismiss, so-called, has been denied.

The sole issue which should have been presented for the Court's consideration by appellee's Motion to Dismiss is whether the District Court's order of November 9th, 1950, denying appellant's Motions to Recall, Quash or Stay Writ of Execution and for Entry of Final Judgment was a "final decision" within 28 U.S.C. Sec. 1291, but this issue is nowhere presented for the Court's attention in appellee's brief in support of its motion, and in fact appellee heavily relies upon an authority which is considered by the appellant to be dispositive of appellee's Motion to Dismiss, i.e., the authority, *In re Forstner Chain Corporation*, 177 Fed. (2d) 572, plainly indi-

cates that a denial of appellee's Motion to Dismiss is in order.

\* \* \*

Respectfully submitted,

NAYLOR and LASSAGNE,

JAS. M. NAYLOR,

By /s/ JAS. M. NAYLOR,

Attorneys for Appellant.

Service acknowledged.

[Endorsed]: Filed Feb. 17, 1951.



No. 12,770

IN THE

United States  
Court of Appeals

For the Ninth Circuit

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ETTORE G. STECCONE, an individual doing  
business under the firm name and style  
of STECCONE PRODUCTS Co.,

*Appellant,*

VS.

MORSE-STARRETT PRODUCTS Co., a corpora-  
tion,

*Appellee.*

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Brief for Ettore G. Steccone

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NAYLOR AND LASSAGNE

JAS. M. NAYLOR

Russ Building

San Francisco 4, California

*Attorneys for Appellant.*

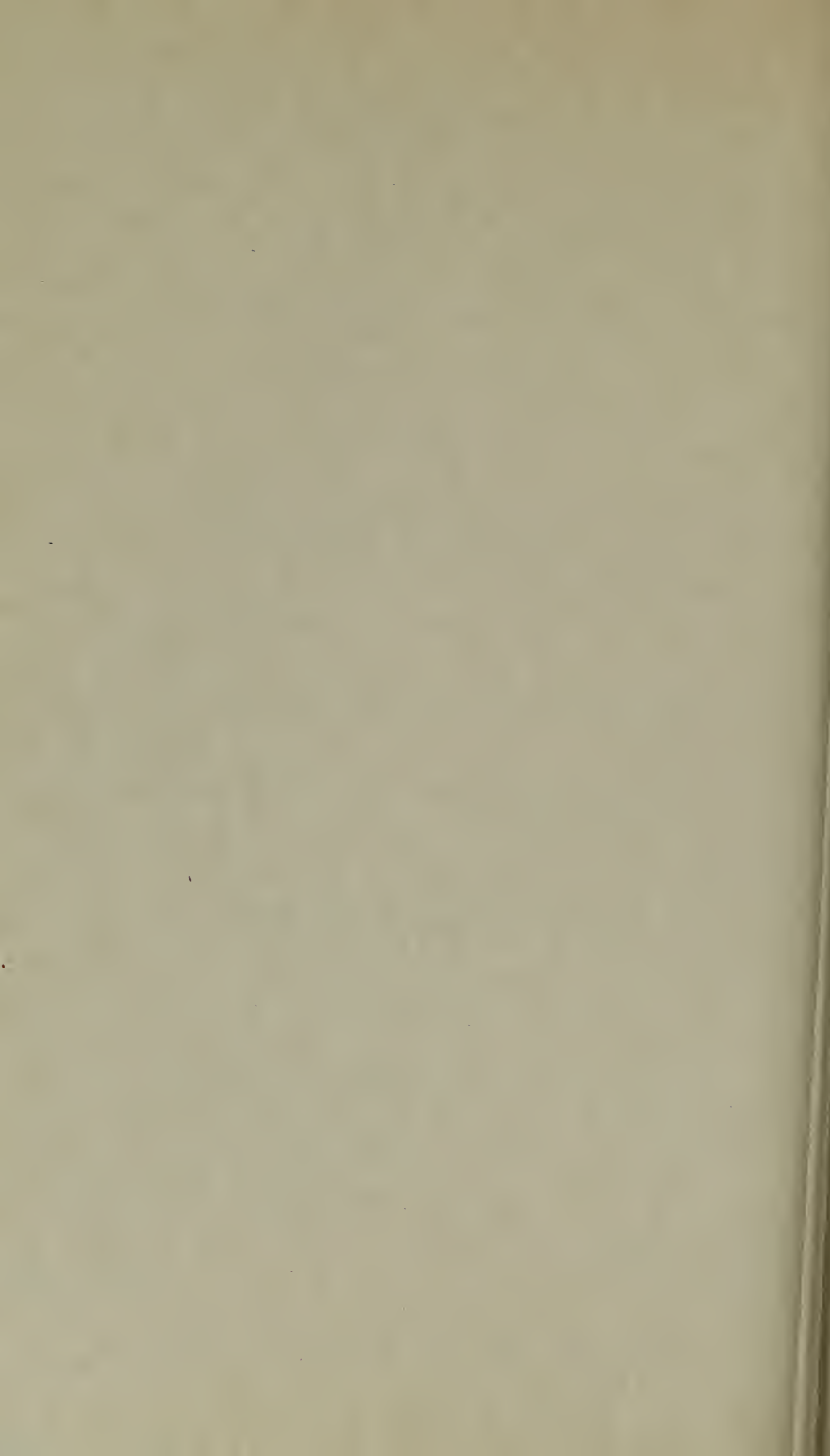
FRANK A. NEAL

*Of Counsel.*

FILED

APR 20 1951





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No. 12,770

IN THE

# United States Court of Appeals

For the Ninth Circuit

---

ETTORE G. STECCONE, an individual doing  
business under the firm name and style  
of STECCONE PRODUCTS Co.,

*Appellant,*

vs.

MORSE-STARRETT PRODUCTS Co., a corpora-  
tion,

*Appellee.*

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## Brief for Ettore G. Steccone

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### JURISDICTIONAL STATEMENT

The basic action,\* out of which this appeal arises, was one for trade mark infringement and unfair competition, jurisdiction having been based on the Trade Mark Laws of the United States (15 U.S.C.A., Chap. 22). The Findings

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\*The Memorandum Opinion of the District Court, following trial on the merits, is reported in *Morse-Starrett Products Co. v. Steccone*, 86 F.S. 796, 83 U.S.P.Q. 496.

of Fact and Conclusions of Law appear at Tr. pp. 3-14, inclusive, and the original Judgment, which was filed and entered January 11th, 1950 and became final for lack of appeal, appears at Tr. pp. 14-17, inclusive.

The proceedings after judgment leading to the filing of this appeal were as follows: On July 20th, 1950 appellee filed a Petition for Order to Show Cause (Tr. pp. 17-27) as to why appellant should not be held in contempt of the District Court's Judgment of January 11th, 1950. Following a hearing\* on the Order to Show Cause, the District Court handed down its Memorandum Opinion (Tr. pp. 96-97) adjudging that appellant had violated said original Judgment in certain respects and a notation of an Order and a notation of the Memorandum Opinion were entered, in the sequence noted, in the Civil Docket by the District Court Clerk (Tr. pp. 130-131). On October 6th, 1950 the District Court entered an Order for Writ of Execution (Tr. pp. 97-98). Thereafter appellant filed a Motion to Recall, Quash or Stay Writ of Execution and for Entry of Final Judgment (Tr. pp. 99-100) which, after hearing† was denied in an Order dated November 9th, 1950 (Tr. p. 126).

This appeal (Tr. p. 127) from the Order of November 9th, 1950, sanctioned by 28 U.S.C.A. 1291, followed.

### STATEMENT OF THE CASE

The root subject matter of this controversy is the surname "STECCONE" which, at one and the same time, is the appellant's heritage and appellee's trade mark, the lat-

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\*The Reporter's Transcript of the hearing appears at Tr. pp. 69-95.

†The Reporter's Transcript of the hearing on the motion appears at Tr. pp. 101-125.



ter by virtue of the judicial reasoning indicated at length in the earlier, reported District Court decision (86 F.S. 796).

The Judgment on the merits of the case (Tr. pp. 14-17) provided for a writ of injunction proscribing appellant's use of the word "STECCONE," *per se*, but at the same time contained certain permissives relative to appellant's use of his surname in the identification of his goods\* and business. The alternative aspects of the Judgment are contained in Paragraph XIII of the Judgment (Tr. pp. 16-17).

On July 20th, 1950 appellee filed a Petition for Order to Show Cause (Tr. pp. 17-27) why appellant should not be held for contempt of the District Court's Judgment in the uses of the surname "STECCONE" typified by, *inter alia*, Exhibits 2, 3 and 4 before the District Court. The proceedings had at the hearing thereon appear at Tr. pp. 69-96. On July 31st, 1950 the District Court handed down its Memorandum Opinion (Tr. pp. 96-97) adjudging that appellant had violated the original Judgment in certain respects. Notations of an Order and a notation of the Memorandum Opinion, in that sequence, were entered in the Civil Docket of the District Court Clerk (Tr. pp. 130-131).

There were no Findings of Fact, Conclusions of Law or Judgment proposed for settlement and entry by the Court to implement the Memorandum Opinion.

On October 6th, 1950 the District Court issued and there was entered in the Civil Docket an Order for Writ of Exe-

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\*For the Court's enlightenment it should be pointed out the products with which both parties are concerned are window-washers' squeegees, i.e., the devices employed by building maintenance men and janitors in cleaning glass and like polished surfaces by repeated swipings, to remove wash water or solutions applied thereto, and the replacement rubber blades therefor.

cution (Tr. pp. 97-98). Three (3) days later, or on October 9th, 1950, appellant filed a Motion to Recall, Quash, Stay Execution and for Entry of Judgment, lodging therewith proposed Findings, Conclusions and Judgment. On November 9th, 1950 the District Court denied the Motions to Recall Writ of Execution and for Entry of Final Judgment and on November 13th, 1950 appellant filed his Notice of Appeal from the last mentioned Order.

On February 19th, 1951 appellee brought before this Court a Motion to Dismiss the appeal. After hearing, the Court ordered the said Motion to Dismiss continued for hearing with the cause on the merits.

The present appeal raises for determination the question whether the District Court entered a *final, appealable Order* or *Judgment* on the July 20th, 1950 Petition for Order to Show Cause. More specifically, did the Memorandum Opinion handed down on July 31st, 1950 constitute a final, appealable order or was it simply a decision advisory in nature and to be implemented by Findings of Fact, Conclusions of Law and a Judgment, as called for in the rules?

### **SPECIFICATION OF ERRORS**

The errors of the District Court which appellant will urge in this Court are as follows:

The Court erred in treating its Memorandum Opinion of July 31st, 1950 as a final, appealable order and in denying appellant's Motion to Enter Final Judgment.

### **SUMMARY OF THE ARGUMENT**

According to the conventional tests, the Memorandum Opinion handed down by the District Court on July 31st, 1950 was not a *final, appealable order*.

This is so because the Memorandum Opinion (Tr. pp. 96-97) purports to do nothing more than state legal conclusions that:

“exhibits 2, 3 and 4 attached to the affidavit of Leon Paul in support of plaintiff’s claim that the defendant has not complied with the judgment of this Court *are violative of that judgment.*” (Emphasis supplied.)

The antecedent use of the phrase “I find” does not, *ipso facto*, convert what is otherwise plainly a legal conclusion into a finding of fact. That the quoted portion of the Memorandum Opinion is a legal conclusion, and nothing more, is demonstrated by the total absence of a recital of particular facts concerning the nature, extent and substance of the violation.

Nor is the Memorandum Opinion converted into a *final, appealable order* by the mere presence of the following paragraph therein:

“I further find that defendant has not complied with the order of this Court requiring him to indicate on the squeegees and the handles thereof manufactured and sold by him that they are not the product of Morse-Starrett Products Co.”

because that is conclusion also and it differs in kind from the proscription of the original judgment on the merits (Tr. pp. 16-17).

Thus, the Memorandum Opinion fails to meet the first test as to finality and appealability in that it asserts mere legal conclusions.

The next test of the sufficiency of the Memorandum Opinion as to finality and appealability is whether it satisfies

R.C.P. Rule 58 and Rule 5\* of the Rules of Practice for the District Court of the United States, Northern District of California, supplementing the Federal Rules of Civil Procedure.

A contempt proceeding, involving constructive contempt, does not differ in any material respect from proceedings on the merits, and hence a decision therein, involving the interpretation and sufficiency of evidence, must be implemented by findings of fact, conclusions of law and judgment, to satisfy the rules of practice.

Since the pertinent rules do not, in letter or spirit, exclude decisions of the courts in contempt proceedings, it must follow that a Memorandum Opinion giving an order is one which requires settlement and approval as to form and the lodging, successively, of proposed findings of fact, conclusions of law and a draft of the judgment.

## **ARGUMENT**

### **The Necessity for Findings, Conclusions and Judgment in Cases Involving Constructive Contempt.**

In trade mark and unfair competition cases the order to show cause why a party should not be adjudged in contempt, as here, brings before the court some marking of goods, adopted subsequent to the judgment on the merits, and involves a comparison of the latest form of marking with the proscriptions (and here, the permissives) of such judgment on the merits. It is at once indicated that when a decision has been handed down in a case of such constructive contempt, the need for findings, conclusions and

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\*For the Court's convenience, the pertinent subdivisions of Rule 5 are printed in an appendix hereto.



judgment is imperative. In this way alone can the record be constituted for proper review.

In the instant case the need for findings of fact and conclusions of law and a settled form of judgment is readily demonstrated.

The judgment on the merits provided, in part, as follows:

### “XIII

That a writ of injunction issue out of and under the seal of this Court enjoining and restraining the defendant, his associates, attorneys, employees, servants, agents, and those in privity with him, or them, from in any manner using the trade-name ‘Steccone’ enclosed by an oval in connection with squeegees, or the handles thereof, and from so using the name ‘Steccone’ that reasonably attentive purchasers cannot readily distinguish between the products of plaintiff and defendant, provided, however, that defendant may make, advertise and sell squeegees as the products of the Steccone Products Co., or as defendant’s product, so long as the name ‘Steccone’, used alone or in conjunction with other words or symbols, on the squeegees or in the written advertising thereof, is accompanied by sufficient explanatory material so as to clearly differentiate it from the product manufactured and sold by plaintiff.”

It will be seen that the quoted part of the judgment forbids absolutely the use of:

“the trade name ‘Steccone’ enclosed by an oval in connection with squeegees, or the handles thereof”

and further qualifiedly enjoins appellant:

“from so using the name ‘Steccone’ that reasonably attentive purchasers cannot readily distinguish between the products of plaintiff and defendant”



concluding with the proviso:

“that defendant may make, advertise and sell squeegees as the products of the Steccone Products Co., or as defendant’s product, so long as the name ‘Steccone’, used alone or in conjunction with other words or symbols, on the squeegees or in the written advertising thereof, is accompanied by sufficient explanatory material so as to clearly differentiate it from the product manufactured and sold by plaintiff.”

The exhibits (2, 3 and 4) scrutinized by the District Court on the order to show cause had, of course, to be compared with this multi-faceted judgment in order to determine whether the markings thereon were violative of the absolute proscription or the conditional injunction or were within the bounds of the proviso thereof. Upon being so compared and interpreted it would follow that a final ruling thereon should be most explicit in stating the particular facts and circumstances of the contempt, to the end that a review as to the sufficiency may be had, to say nothing of the need for a clear directive to the contemnor.\*

Here, however, the District Court merely found (in the sense of concluding or deciding) that exhibits 2, 3 and 4 were violative of the judgment and that the defendant had not complied with the order of the Court requiring him to indicate on the squeegees and the handles thereof manufactured and sold by him that they are not the products of

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\*A typical example of findings of fact and conclusions of law in an unfair competition case, setting forth the facts of the violation with the desired particularity, is to be noted in *Camille, Inc. v. F. W. Fitch Company*, 30 F.S. 532, 43 U.S.P.Q. 375. Note especially the complete compatibility between the language of the original decree and the finding relative to the contempt.

Morse-Starrett Products Co., without a statement of any kind as to the particular facts and circumstances.

At 17 C.J.S. § 88 (pp. 129-130) the following appears:

“Many authorities hold that the warrant of commitment in either direct or constructive contempts should state the particular facts on which the order is founded, including sufficient facts to show the court’s authority, in order that a review as to the sufficiency may be had.”

and the footnote at p. 130 thereof contains this statement:

“(1) Whether contempt is criminal or civil contempt, order for commitment must state circumstances of contempt, it being insufficient merely to assert legal conclusion that contemnor violated, or instigated violation of mandate of court.”

*In re Lake*, 65 Cal. App. 420, indicates the necessity for findings of fact rather than mere conclusions in judgments on contempt.

The necessity of findings of fact and law, in contempt proceedings, is further indicated at 17 C.J.S. § 124 (p. 168) where reviewability of the evidence in order to determine whether there is any competent evidence to support the “findings,” is discussed.

It is respectfully submitted, therefore, that here there was a plainly indicated need for findings, conclusions and a settled judgment in order to serve the necessities of the case and the ends of justice.

Thus, the Memorandum Opinion fails to meet a further test as to finality.

**The Memorandum Opinion Filed Herein Did Not Satisfy the Rules Requiring Entry of Judgment.**

When analyzed, the Memorandum Opinion of July 31, 1950 (Tr. pp. 96-97), will be found to be a mere directive for "entry of judgment for other relief" as to which R.C.P. Rule 58 requires that:

"\* \* \* the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk."

Under similar circumstances this Court has construed the rules (R.C.P. Rule 58) as requiring an "entry of judgment" and refused to treat the mere filing of an *opinion* as meeting this requirement (see *Uhl v. Dalton*, 151 F.(2d) 502).

In deciding the *Uhl* case as it did, this Court was but following the better reasoned authorities on this same proposition. Thus, in *In re D'Arcy*, 142 F.(2d) 313, 315 (C.A. 3), it was said:

"In the federal courts an opinion is not a part of the record proper. *England v. Gebhardt*, 1884, 112 U.S. 502, 506, 5 S.Ct. 287, 28 L.Ed. 811. *Consequently, a statement in an opinion of the conclusion reached by the court, even though couched in mandatory terms, cannot serve as the order or judgment of the court. It is necessary that a definitive order or judgment be made and entered in the court's docket in due form.* In *Alleghany County v. Maryland Casualty Co.*, 3 Cir., 1943, 132 F.(2d) 894, 897, certiorari denied 318 U.S. 787, 63 S.Ct. 981, 87 L.Ed. 1154, we pointed out the vital importance of a court's judgment being clear and unambiguous. For similar reasons Civil Procedure Rule 79a, requires that all orders and judgments of the district court in civil actions shall be noted in the docket on the folio assigned to the action and Rule

58 provides that the notation of a judgment in the docket as provided by Rule 79a shall constitute the entry of the judgment and that the judgment shall not be effective before such entry." (Emphasis supplied.)

In *St. Louis Amusement Company v. Paramount Film Distributing Corp.*, 156 F.(2d) 400 (C.A. 8), the Court observed:

"The plaintiffs in taking their appeal to this court have evidently considered and relied upon the written opinion of the trial judge as a final judgment in the cause, reviewable as such in this court, and the appeal has been briefed, argued and submitted on that assumption."

In citing *In re D'Arcy*, *supra*, with approval, that Court had this to say:

"In view of Rule 58, we are constrained to hold that *the mere filing of the judge's opinion* in this case which is shown by the transcript of the record before us, *does not establish that a final judgment has been entered* which has been made effective in the manner prescribed by the Rules and which is reviewable in this court. If no judgment has been docketed, there is no judgment from which to appeal and the appeal is premature." (Emphasis supplied.)

The determination of whether the "Memorandum Opinion" can be construed as a final judgment within the meaning of R.C.P. Rule 58, depends upon the nature of the document and local practice. See *In the Matter of Forstner Chain Corp.*, *Forstner Chain Corp. v. Marvel Jewelry Mfg. Co.*, 177 F.(2d) 572 (C.A. 1). The Court there observed:

"An opinion is not itself a judgment, even though it contains conclusions of fact or of law, and foreshadows



how the judge intends to dispose of the case. Not infrequently, however, there is tacked on at the end of an opinion a sentence in mandatory language such as: 'The complaint is dismissed.' In the understanding and practice of the particular court, this concluding sentence may be the final judgment, the concluding judicial act or pronouncement disposing of the case, to be entered by the clerk forthwith. But not necessarily so. See *Commissioner v. Estate of Bedford*, *supra*, at p. 286. If it is the practice of the court to pronounce judgment in a more formal manner, in a separate document entitled 'Judgment', then the concluding sentence at the end of the opinion amounts to no more than a direction to the clerk for the preparation of the final judgment on behalf of the court; the formal judgment will then be signed or initialed by the judge or issued in the name of the court under the attestation of the clerk (whatever is the local practice), and not until then will the clerk make the entry of the judgment in the civil docket in accordance with Rule 79(a)."

The local practice, as set forth in Local Rule 5, requires that something be done beyond the mere filing of a memorandum opinion, to wit, the settlement and approval of the form of order or judgment (Rule 5(d)) and a specific direction to the clerk to enter the form of judgment or order so settled and approved (Rule 5(c)(3)).

It is respectfully submitted that the language of Local Rule 5 is clear and unambiguous in its requirements as to findings, conclusions and form of judgment and embraces the proceedings terminative of the contempt proceedings in the case at bar. If the rule cannot be taken at face value, then it is a snare and a delusion placing in jeopardy the rights of any and all who rely upon its apparent meaning.



With respect to opinions or memorandum orders for judgment Local Rule 5(e) calls for the lodging of a draft of findings of fact and conclusions of law by the prevailing party within five days after receipt of a written notice of such opinion or memorandum. The rule then goes on to provide for the lodging of proposed amendments by the adversary and eventual settlement by the Judge. *No such draft was lodged in the case at bar.*

With respect to a "decision of the Court giving any order which requires settlement and approval as to form," Rule 5(d) requires the prevailing party to prepare "a draft of the order or judgment embodying the Court's decision and present it for approval to each party who has appeared in the action." It then goes on to establish the procedure for approval or non-approval by the parties as to form; the proposal of modifications and finally the signing and filing of the judgment. *No such draft was lodged in the case at bar.*

It is respectfully submitted that the Local Rule 5 is entirely compatible with R.C.P. Rule 58 and is intended as a declaration of the local practice to work hand-in-glove with the Rules of Civil Procedure, of which the local rules are declared to be supplementary.\* That being the case, the rule must be deemed to have a purpose and it was not adopted to be honored in the breach.

Further light on the "local practice" is shed by the fact that appellee found it necessary to implement the "Memorandum Opinion" by obtaining an order for writ of execution (Tr. pp. 97-98), which may be taken as an indication

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\*Local Rule 1 is prefaced by the statement: "These rules supplement the Federal Rules of Civil Procedure, which will be herein referred to as RCP."

that the clerk of the District Court did not regard the Memorandum Opinion as being in itself a final order or as containing within its four corners a sufficient directive as to his further acts.

**The Fact That the Memorandum Opinion Acted Upon or Interpreted the Original Judgment Demonstrates Further Its Lack of Finality.**

Conceding that under some circumstances and conditions a Memorandum Opinion could be a final, appealable order, it is clear that this is not true unless it disposes of all of the basic issues of the controversy.

Here, while the proceeding was termed a contempt proceeding, there is a question as to whether the Court below considered and treated the proceeding as such, or whether the Court considered and treated the proceeding as one seeking clarification and delineation of the original decree, and a measuring of the decree so clarified against the acts complained of, or whether the Court considered and treated the proceeding as one sounding in part in contempt and in part clarification, or expansion, of the original decree. This question is definitely posed not only by the nature of the Court's opinion, but by the nature of the relief sought by appellee, which was that appellant be adjudged to be in contempt and that the District Court enter a further order enjoining the defendant from performing certain acts (see Paragraph 3 of petitioner's prayer for relief, Tr. p. 26).

This in turn indicates that the Court may have looked through the form of the proceeding to its substance, and treated the matter as one allowing it to clarify and better define what it intended to enjoin by the original decree. If this were so, then the Court's reference to certain of defendant's acts as being violative of the decree is not neces-

sarily tantamount to a statement that defendant was in contempt. The Court's term "violative of the decree" is open to the construction that what was meant was that defendant's acts were violative of what the Court intended the decree to mean, but which was not clearly conveyed by its terms.

In any event, a basic issue was whether defendant disobeyed understandably clear terms of the original decree. This issue still remains and hence there has at yet been no final decision. If the terms were understandably clear, and defendant violated them, a specific adjudgment of contempt is required in order to make the Court's decision expressed in its Memorandum Opinion a final one. If, on the other hand, the terms of the original decree left a penumbral region within which it is clear only to the Court that defendant's presence is anathema, defendant is entitled to a specific adjudgment of non-contempt, even though this adjudgment be accompanied by further adjudgment that defendant cease doing certain acts because such acts will be henceforth considered to be violative of the original decree as it is now expanded and clarified.

Setting Paragraph XIII of the Judgment (Tr. pp. 16-17) and the penultimate paragraph of the Memorandum Opinion in apposition provides a clear demonstration that the District Court was, in fact, clarifying or expanding the original judgment. Thus, the order that appellee:

"forthwith cease and desist from manufacturing and selling any squeegees or handles thereof marked with the word 'Steccone' used alone, or *in connection with other words or symbols which do not clearly indicate that they are not the product of the Morse-Starrett Products Co.*" (Emphasis supplied.)

differs in kind and specie from the judgment proviso:

“that defendant may make, advertise and sell squeegees as the products of Steccone Products Co., or as defendant’s product, so long as the name ‘Steccone’, used alone or in conjunction with other words or symbols, on the squeegees or in the written advertising thereof, *is accompanied by sufficient explanatory material so as to clearly differentiate it from the product manufactured and sold by plaintiff.*”

It will thus be seen that the judgment proviso required that “STECCONE,” used alone or in conjunction with other words or symbols, must be *accompanied by sufficient explanatory material*, whereas the Order of the opinion placed the job of differentiation upon the shoulders of the *words or symbols* used, in connection with “STECCONE.”

In such a situation the need for findings, conclusions and a settled form of judgment is self-evident. Without them an appellate tribunal could not hope to be adequately informed, nor could the contemnor proceed except with the constant peril of further interpretation and expansion of the original judgment to feed it with its intended but unexpressed meaning. The appellate court could not divine the propriety of the particular proceeding and ruling to determine whether the violation was dependent upon “plain facts of intendment to violate the decree” (cf. *Terminal R.R. Assn. v. U. S.*, 266 U.S. 29; *One-Two-Three Company, Inc. v. Tavern Fruit Juice Co., Inc.*, 54 F.S. 574, 60 U.S.P.Q. 488, 491) or whether the appellee should have been relegated to a suit for alleged infringement (cf. *California Artificial Stone Paving Co. v. Molitor*, 113 U.S. 609-618).



## CONCLUSION

For the reasons set forth, it clearly appears that the District Court erred in treating its July 31st, 1950 Memorandum Opinion as a final, appealable order and in denying appellant's motion for entry of judgment. There is nothing so unusual about a constructive contempt proceeding as would except it from the plain meaning of R.C.P. Rule 58 and Local Rule 5 and it definitely appears that the requirements of these rules have not been served or met. In matters of constructive contempt the very nature of the proceeding furnishes a compelling reason why the final disposition should abide by the rules which have been set up in the interests of the proper administration of justice, for rules of conduct or curbs upon a party should never be left to speculation and doubt.

Assuming, *arguendo*, that contempt proceedings were an exception to the rule requiring findings of fact, conclusions of law and a settled form of judgment, the Memorandum Opinion in the case at bar would, in and of itself, take the case out of such exception, because as above pointed out, the District Court was in such Memorandum Opinion acting upon the original judgment to clarify or expand it, and so far as the clarification or expansion is concerned, the proceeding was something more than a contempt proceeding.

It is respectfully argued that the District Court Order denying the appellant's Motion to Enter Judgment should



be reversed and the case remanded for further proceedings consistent with the spirit and intent of the applicable rules.

Respectfully submitted,

NAYLOR AND LASSAGNE

JAS. M. NAYLOR

*Attorneys for Appellant.*

FRANK A. NEAL

*Of Counsel.*

Dated April 20, 1951.

**(Appendix follows)**





## APPENDIX

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### LOCAL RULE 5

#### (United States District Court for the Northern District of California)

“ \* \* \* \* \*

(c) *Entry of Judgments and Orders.* (1) The notation of judgments and orders in the civil docket by the Clerk shall in all cases be made at the earliest practicable time. The notation of judgments will not be delayed pending taxation of costs, but a blank space may be left in the form of judgment for insertion of costs by the Clerk after taxation.

(2) Orders and judgments under subdivisions (a) and (b) of this rule will be noted in the civil docket immediately after the Clerk has signed them. The Clerk may require any party obtaining a judgment or order which does not need to be approved as to form by the Judge, to supply him with a draft thereof.

(3) Except in the instances enumerated in subdivisions (a) and (b) of this rule, no judgment or order will be noted in the civil docket until the Clerk has received from the Court a specific direction to enter it. Unless the Court's direction is given to the Clerk in open Court and is noted in the minutes, it should be evidenced by the signature or initials of the Judge on the form of judgment or order.

(4) Every order and judgment shall be filed in the Clerk's office. Where the Clerk has requested a draft, or where the form of an order or judgment has been settled by the Court, a copy must also be delivered to the Clerk for addition to the civil order book.

(d) *Settlement of Orders and Judgments by the Court.* Within five days of the decision of the Court giving any order which requires settlement and approval as to form, the prevailing party shall prepare a draft of the order or judgment embodying the Court's decision and present it for approval to each party who has appeared in the action. Each party shall examine it at once, and if he approves, endorse with the words, 'Approved as to form, as provided in Rule 5(d),' and append his signature thereto. Such endorsement shall not affect the rights of any party, but shall be considered only as an indication to the Judge that the form is correct. If any party does not approve, he shall endorse with the words, 'Not approved as to form, as provided in Rule 5(d),' specifying his reasons. The party proposing the order or judgment shall thereupon serve a copy upon each other party, and lodge the original and one copy with the Clerk. Each party who disapproves the order or judgment shall have five days within which to serve and lodge with the Clerk proposed modifications thereof. If all parties approve, or if no modifications are presented within said five days, the order or judgment, if approved by the Judge shall be signed and filed by him. If any proposed modifications of the order or judgment are presented as herein provided, the Judge shall order such modifications made as he deems proper. If the attorney for the prevailing party fails to observe the above provisions, any attorney in the case may submit to the Judge a draft of the proposed order or judgment.

(e) *Findings of Fact and Conclusions of Law.* Within five days after receipt of written notice of an opinion or memorandum order for judgment, the prevailing party shall



prepare a draft of the findings of fact and conclusions of law and lodge them with the Clerk, serving a copy upon the adverse party, who may within five days thereafter file with the Clerk and serve upon the prevailing party his proposed amendments. If the adverse party proposes no amendments he may endorse his approval on the original draft, which may then be presented immediately to the Judge for his signature.

If the prevailing party fails to lodge and serve his draft within five days, the adverse party may proceed within five days thereafter as herein provided.

The findings of fact and conclusions of law shall thereafter be settled by the Judge, and when so settled shall be signed by him and filed.

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No. 12,770

United States Court of Appeals  
For the Ninth Circuit

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ETTORE G. STECCONE, an individual  
doing business under the firm name  
and style of Steccone Products Co.,  
*Appellant,*

VS.

MORSE-STARRETT PRODUCTS Co.,  
a corporation,

*Appellee.*

Appeal from the United States District Court,  
Northern District of California,  
Southern Division.

BRIEF FOR APPELLEE.

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MAY 21 1951

PAUL A. O'BRIEN, CLERK



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No. 12,770

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*Appellee.*

**Appeal from the United States District Court,  
Northern District of California,  
Southern Division.**

**BRIEF FOR APPELLEE.**

---

**STATEMENT OF THE CASE.**

The basic facts of this appeal are extremely simple and are as follows:

On January 11, 1950, the District Court entered a judgment whereby appellant was enjoined from performing the following acts:

“That a writ of injunction issue out of and under the seal of this Court enjoining and restraining the defendant, his associates, attorneys,

employees, servants, agents, and those in privity with him, or them, from in any manner using the trade-name 'Steccone' enclosed by an oval in connection with squeegees, or the handles thereof, and from so using the name 'Steccone' that reasonably attentive purchasers cannot readily distinguish between the products of plaintiff and defendant, provided, however, that defendant may make, advertise and sell squeegees as the products of the Steccone Products Co., or as defendant's product, so long as the name 'Steccone,' used alone or in conjunction with other words or symbols, on the squeegees or in the written advertising thereof, is accompanied by sufficient explanatory material so as to clearly differentiate it from the product manufactured and sold by plaintiff." (TR 16-17.)

Thereafter, on July 20, 1950, appellee filed a petition for order to show cause (TR 17-27) and the District Court on July 20, 1950, issued its order to show cause. (TR 38.) A hearing was held on the order to show cause on July 26, 1950, and on July 31, 1950, the District Court made an order directing appellee<sup>ant</sup> to cease and desist from performing certain contemptuous acts. This order was entered in the docket of the District Court Clerk on July 31, 1950. This docket entry appeared in the District Court Clerk's record as follows:

"July 31—Ord. deft. cease and desist from circularizing cert. printed circulars and manufacturing and selling improperly marked squeegees and handles and pay to plttf's. atty. \$500.00 atty. fees. (Erskine)" (TR 130.)



Also, on July 31, 1950, there was filed and docketed in the District Court docket a memorandum opinion and order signed by the district judge, this order the judge entitled "Memorandum Opinion". The clerk, on docketing the memorandum opinion, made the following entry in the Court's docket:

"July 31—66 Filed memo. opinion of court that deft. cease and desist from circularizing certain printed circulars; mfg. and selling improperly marked squeegees and handles and pay plttf's atty. \$500.00. (Erskine)" (TR 131.)

The memorandum opinion, for the convenience of the Court, is set forth in full:

"I find that exhibits 2, 3 and 4 attached to the affidavit of Leon Paul in support of plaintiff's claim that the defendant has not complied with the judgment of this Court are violative of that judgment. I do not make the same finding with respect to exhibits 1 and 5 attached to said affidavit, because the evidence indicates that these publications were not made by defendant but were made by dealers over whom this Court has no jurisdiction.

"See Tubular Heating & Ventilating Co. v. Mt. Vernon Furnace & Mfg. Co., 2 F.(2d) 982, 983.

"I further find that defendant has not complied with the order of this Court requiring him to indicate on the squeegees and the handles thereof manufactured and sold by him that they are not the product of Morse-Starrett Products Co.

"Accordingly it is Ordered that the defendant forthwith cease and desist from printing, circu-

larizing or using in any manner whatsoever the said exhibits 2, 3 and 4, or substantial copies thereof, and furthermore that he forthwith cease and desist from manufacturing and selling any squeegees or handles thereof marked with the word 'Steccone' used alone, or in connection with other words or symbols which do not clearly indicate that they are not the product of the Morse-Starrett Products Co.

"It is further Ordered that defendant pay to plaintiff a reasonable attorney's fee, to wit, the sum of \$500.00 for services of plaintiff's attorneys in the commencement and prosecution of said contempt proceedings." (TR 96-97.)

No appeal was taken from the order of July 31, 1950.

On October 6, 1950, application was made to the District Court for an order for writ of execution (TR 97-98) and the writ issued on October 6, 1950. Thereafter and on October 9, appellant filed motions and notice of motions to recall, quash or stay writ of execution and for entry of final judgment. (TR 99-100.)

A hearing was held on appellant's motions on October 23, 1950 (TR 101-126) and the clerk made the following docket entry:

"Nov. 9—Ord. motions to recall writ of execution and for entry of final judgment, each denied. (Erskine)" (TR 132.)

It is interesting to note at this point that no findings of fact, conclusions of law or a final judgment were

prepared, requested or submitted by appellant to the district judge for settlement on the order of November 9, 1950; however, on November 13, 1950, appellant filed a notice of appeal from the order of November 9, 1950, bringing the case before this Court.

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### ISSUE ON APPEAL.

The sole issue of this case is whether or not the order of July 31, 1950, which the District Court judge entitled "Memorandum Opinion" is a final appealable decision within the meaning of 28 USCA 1291, which states:

"The Courts of Appeals shall have jurisdiction of appeals from the final decisions of the District Courts of the United States \* \* \*."

That such is the sole issue on this appeal is readily ascertained from several statements made by appellant in his brief. (Appellant's Brief, pages 4, 10, 14.) In the appellant's statement of points, filed in this Court pursuant to Rule 75(d) Federal Rules of Civil Procedure, appellant states as follows:

"There has been no appealable decision by the District Court following the hearing on the Order to Show Cause, filed July 20, 1950."

In the appellant's brief (page 4) under the heading "Statement of the Case" appellant in the last paragraph thereof states:

“The present appeal raises for determination the question whether the District Court entered a *final, appealable Order or Judgment* on the July 20th, 1950 Petition for Order to Show Cause. More specifically, did the Memorandum Opinion handed down on July 31st, 1950 constitute a final appealable order or was it simply a decision advisory in nature and to be implemented by Findings of Fact, Conclusions of Law and a Judgment, as called for in the rules?”

Also in appellant's brief (page 4) under the heading “Specification of Errors” appellant states as follows:

“The Court erred in treating its Memorandum Opinion of July 31st, 1950 as a final appealable order and in denying appellant's Motion to Enter Final Judgment.”

Basically, the sole issue of this appeal is whether or not an appealable decision must be labeled or entitled “Judgment.”

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#### **INCONSISTENCIES OF APPELLANT'S POSITION.**

It is interesting to note how the appellant has set forth in his brief (pages 12-13) in great detail that which appellant deems to be the local practice. In so doing, appellant stresses at great length Local Rule 5 and in particular those subdivisions directed to decisions of the Court giving any order which requires settlement and approval as to form. After reading appellant's brief, one is almost convinced that local practice requires in all cases, before there can be an



appealable decision, formal findings of fact, conclusions of law and a formal judgment.

If, as appellant contends, such are the requirements of local practice, where then are the findings of fact, conclusions of law and judgment, upon which this appeal is based? Clearly, appellant does not contend that the order denying appellant's motion to recall, quash, or stay writ of execution and for entry of final judgment is not a final decision from which an appeal can be taken. Yet the very order from which appellant is appealing is not supplemented by formal findings of fact, conclusions of law and judgment.

It is submitted that in this respect, appellant is wholly inconsistent. If the appellant thought that Local Rule 5 was controlling in this matter, then why did he not follow the clear provisions of Local Rule 5(e) wherein it provides:

"If the prevailing party fails to lodge and serve his draft [findings of fact and conclusions of law] within five days, the adverse party may proceed within five days thereafter as herein provided."

Thus, if appellant at the time of entry of the order of July 31, 1950, was following the provisions of Rule 5(e), then after appellee herein failed to prepare, serve and lodge findings of fact and conclusions of law, appellant should have, within five days, prepared, served and lodged said findings and conclusions.

Undoubtedly, Rule 5(e) did not come to the mind of appellant or his attorney until after they forgot to appeal, within the time provided, from the order of



July 31, 1950. It was only after this failure to appeal that appellant sought the benefit of the provisions of Rule 5(e), disregarding, of course, the provisions thereof which placed any obligation upon appellant to preserve his rights under said rule.

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### GENERAL STATEMENT OF THE LAW.

The applicable code section is 28 USCA 1291, which states as follows:

“The Courts of Appeals shall have jurisdiction of appeals from the final decisions of the District Courts of the United States \* \* \*.”

Under this present appeal, the sole issue turns on the meaning of the words “final decisions” as set forth in 28 USCA 1291.

The Federal Rules of Civil Procedure, Rule 54(a) defines “Judgment” as follows:

“ ‘Judgment’ as used in these rules includes a decree and *any order*\* from which an appeal lies.”

It can be generally stated that in determining whether or not a final decision has been rendered one must look to the substance and not the form, and if the decision terminates the litigation between the parties on the merits of the case, then it is a final decision within the meaning of 28 USCA 1291.

In the case of *Baltimore & O. R. Co. v. United Fuel Gas Co. et al.*, 154 F. (2d) 545, the Court stated as follows:

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\*All emphasis ours unless otherwise noted.

“In applying the test of what constitutes a final decision, the federal courts seem to have regarded substance rather than form, and to have been guided by practical rather than by purely theoretical considerations.”

In the case of *In re Forstner Chain Corporation, Forstner Chain Corporation v. Marvel Jewelry Mfg. Co.*, 177 F. (2d) 572, the Court of Appeals for the First Circuit stated:

“\* \* \* A final judgment is the concluding judicial act or pronouncement of the court disposing of the matter before it. But neither by statute nor by rule is there a requirement that judgment be pronounced in any particular way, or embodied in written form in a separate formal document entitled ‘Judgment’. See *United States v. Hark*, 1944, 320 U. S. 531, 534, 64 S. Ct. 359, 88 L. Ed. 290.”

In this respect, it should be noted that the appellant has cited at great length the case of *In re D’Arcy*, 142 F. (2d) 313, 315, and particular emphasis was placed on the following statement:

“Consequently, a statement in an opinion of the conclusions reached by the court, even though couched in mandatory terms, cannot serve as the order or judgment of the court. It is necessary that a definitive order or judgment be made and entered in the court’s docket in due form.”

However, this statement by the Court is pure dicta for the case was actually decided on the ground that the mandatory language in the opinion was never

entered in the docket as an order. Such are not the facts in the present case.

Even so, in the later and far better reasoned case of *In re Forstner Chain Corporation*, 177 F. (2d) 572, the Court points out the great error of this dicta, as follows:

“The mere fact that under the old learning an opinion was not part of a common law record, *England v. Gebhardt*, 1884, 112 U.S. 502, 504, 5 S.Ct. 287, 28 L.Ed. 811, does not compel the conclusion that ‘a statement in an opinion of the conclusion reached by the court, even though couched in mandatory terms, cannot serve as the order or judgment of the court.’ *In re D’Arcy*, 3 Cir., 1944, 142 F.2d 313, 315. There being no requirement of statute or rule that judgment must be pronounced in any particular form, we see no reason why the court may not, if it chooses, embody its judgment in a sentence appended at the end of an opinion. This sentence, as the judgment, would then be part of a common law record, even though the preceding opinion might not be. The old technicalities of a common law record would be inapplicable to the present case anyway, since the complaint here is in the nature of a bill in equity for an injunction and an accounting. Furthermore, law and equity are merged under the Federal Rules of Civil Procedure. Under Rule 75(g) it is prescribed that the opinion shall be certified and transmitted as part of the record on appeal.”

**LOCAL PRACTICE AND LOCAL RULE 5(d).**

Appellant sets forth at great length Local Rule 5 as establishing the local practice of requiring a formal judgment.

Appellant states that Rule 5(d) requires that there be a settlement and approval of the form of order or judgment and that Rule 5(c)(3) requires a specific direction to the clerk to enter the form of judgment or order so settled and approved.

These general statements by appellant are quite deceptive and are in fact but a sham, loaded with half-truths.

That such is a fact can be readily ascertained from a reading of the first sentence of Rule 5(d) which states:

“Within five days of the decision of the Court giving any order *which requires settlement and approval as to form*, the prevailing party shall prepare a draft of the order or judgment embodying the Court’s decision and present it for approval to each party who has appeared in the action.”

Note that the rule only applies to those orders *which require settlement and approval as to form*.

However, the rule itself recognizes that it is directed toward form only and not substance for the rule also states as follows:

“If all parties approve, or if no modifications are presented within said five days, the order or



judgment, if approved by the Judge, shall be signed and filed by him.”

Clearly, under the present facts, the decision of the Court was not such an order which required settlement and approval as to form by the district judge because it was made by the judge. However, even if the decision of the Court was such an order which required settlement and approval as to form, the appellant has waived any objection to the form by failing to lodge with the clerk proposed modifications within the specified five days. Thus, the written decision and order of the Court which was signed and filed by the judge is in full accord with the local practice, even though appellant disapproves of its form.

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#### LOCAL PRACTICE AND LOCAL RULE 5(e).

It is clear from the facts of this case and the precise language of Rule 5(e) that appellant has merely latched onto this local rule as a pure afterthought. Local Rule 5(e) applies only in those cases wherein there is a written notice of an opinion or memorandum order *for judgment*. Clearly under the present facts the Court decision was not an opinion or memorandum order *for judgment* but it was in fact the final order or judgment itself. If the appellant is at all serious in his contention, why then did he not comply with the second paragraph of Rule 5(e) which provides:



“If the prevailing party fails to lodge and serve his draft within five days, the adverse party may proceed within five days thereafter as herein provided.”

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**LOCAL RULE 5 BUT A SUPPLEMENT TO RULES 52 AND 58  
OF THE FEDERAL RULES OF CIVIL PROCEDURE.**

It is true, as appellant so states, that the Local Rules are but a supplement to the Federal Rules of Civil Procedure. In this respect, it is interesting to note that appellant only mentions Rule 58 of the Federal Rules of Civil Procedure. However, Local Rule 5 is also intended to supplement Rule 52 of the Federal Rules of Civil Procedure which pertains to findings of fact and conclusions of law. Rule 52 expressly provides for a situation as presented under the present facts, for the rule states as follows:

*“\* \* \* If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).”*

Rule 58 of the Federal Rules of Civil Procedure pertains to the entry of judgment and provides as follows:

*“\* \* \* When the court directs that a party recover only money or costs or that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when*

the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. \* \* \*

Clearly the District Court has complied with Rules 52 and 58 of the Federal Rules of Civil Procedure. As to the local practice, there was strict compliance with Local Rule 5(c)(3) inasmuch as the form of the judgment or order was signed by the judge himself.

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**THE DISTRICT COURT'S MEMORANDUM OPINION IS IN COMPLETE COMPLIANCE WITH BOTH THE FEDERAL RULES OF CIVIL PROCEDURE AND LOCAL RULES.**

Clearly the memorandum opinion has set forth in sufficient detail those specific acts which the Court found as a matter of fact to be in violation of the original judgment.

Judge Erskine, in his memorandum opinion, made the following findings of fact and conclusions of law:

“I find that Exhibits 2, 3 and 4, attached to the affidavit of Leon Paul in support of plaintiff's claim that the defendant has not complied with the judgment of this court, are violative of that judgment.

I do not make the same finding with respect to Exhibits 1 and 5, attached to said affidavit, because the evidence indicates that these publications were not made by defendant but were made by dealers over whom this court has no jurisdiction.

See Tubular Heating and Ventilating Co. v. Mt. Vernon Furnace & Mfg. Co., 2 Fed.2d 982, 983.

I further find that defendant has not complied with the order of this court requiring him to indicate on the squeegees and the handles thereof manufactured and sold by him that they are not the product of Morse-Starrett Products Co.”

Then, based on these findings, Judge Erskine made the following order:

“Accordingly, IT IS ORDERED that the defendant forthwith cease and desist from printing, circularizing or using in any manner whatsoever the said Exhibits 2, 3 and 4, or substantial copies thereof; and furthermore

That he forthwith cease and desist from manufacturing and selling any squeegees or handles thereof marked with the word ‘Steccone’ used alone or in connection with other words or symbols which do not clearly indicate that they are not the product of the Morse-Starrett Products Co.

IT IS FURTHER ORDERED that defendant pay to plaintiff a reasonable attorney’s fee, to-wit, the sum of \$500.00, for services of plaintiff’s attorneys in the commencement and prosecution of said contempt proceedings.”

The terms of this order were clear and understandable and needed no further explanation. From the very terms of the order, it is seen that the entire controversy between these parties with respect to the charge of civil contempt of Court was settled.

Appellant appears to be of the opinion that the judge in setting forth his findings of fact and conclusions of law must do so with great elaboration of detail or particularization of facts and that the facts and conclusions must be separately stated. Such elaboration is not necessary, as was stated by this Court in the case of *Burnham Chemical Co. v. Borax Consolidated*, 170 F. (2d) 569. In so deciding, this Court cites the case of *Hazeltine Corporation v. General Motors Corporation*, 131 F. (2d) 34, 37, which states as follows:

“\* \* \* If, however, the opinion of the trial judge afforded a ‘clear understanding of the basis of the decision below’ and resolved the major factual disputes, the mere formal requirement of separation of findings of fact and conclusions of law has been held not sufficient to necessitate a reversal. In this case, a reading of the trial judge’s opinion reveals a full discussion and treatment of the major factual issues which leaves no doubt as to which facts the court accepted and relied upon in rendering its decision. These we can treat as findings of fact and so do.”

Obviously anyone reading the District Court’s memorandum opinion can readily ascertain those facts and conclusions the Court accepted and relied on in rendering its decision. To say otherwise is to avoid the obvious.



**FINALITY OF DECISION A QUESTION OF  
INTENT OF THE JUDGE.**

As previously pointed out, the question of finality of decision is one of substance and not form. In looking to the substance of a decision, the intent of the district judge must obviously be taken into consideration. In the case of *In re Forstner Chain Corporation*, 177 F. (2d) 572, this was well stated as follows:

“\* \* \* But upon the whole it seems more sensible to test the finality by what the district judge thought he was doing. In the order now appealed from he made what he must have regarded as the proper disposition of the plaintiff’s motion, and in that view there were no further proceedings in the case to be had before him. \* \* \*”

There can be little doubt that the district judge in this case intended that the memorandum opinion and order be the final order or decision. That such is a fact, can readily be ascertained from several of the district judge’s own statements made during the hearing of appellant’s motion to recall, quash or stay writ of execution and for entry of judgment. (TR pp. 101-126.)

That Judge Erskine considered his order of contempt to be final and had no intention of making and entering findings of fact and conclusions of law or a formal judgment in this matter, is clear from the record, where at TR p. 109 he said:

“I was unaware of the fact that there was any provision for findings and conclusions of law in connection with the violation of a contempt proceeding, based upon an alleged violation of the



order of the court. I really intended that order to be final; I didn't expect it to have any findings proposed upon that order."

Also at Tr. p. 118 Judge Erskine made a further observation as follows:

"I made certain findings in this opinion, was improperly called an opinion; I made certain findings in it and then I go on and say it is ordered, accordingly it is order, it is further ordered that the defendant pay to the plaintiff, and so forth. Those are outright orders, but nothing in the memorandum to prepare findings and a judgment."

Again, at TR pp. 123-124, Judge Erskine expressed his intention in the following way:

"The Court. I will look into the authorities on the thing. I would like to relieve you, but if you think, and the matter depends on what my intent was originally, then really I am stultifying myself and reversing and changing my intent by \* \* \*"

\* \* \* \* \*

"The Court. Intended to enter a judgment as I did, as I thought I did. The mere fact that it was a memorandum, or marked memorandum of opinion doesn't seem to me it ought to change the effect on the docket. A rose by any other name would smell as sweet. I say I order this and I order that. \* \* \*"

It is seen, therefore, that the District Court considered his order of July 31, 1950, adjudging appellant guilty of contempt, to be a final order.

**THE SUBSTANCE OF THE PROCEEDING OUT OF WHICH THE  
DISTRICT COURT ISSUED ITS MEMORANDUM OPINION.**

As previously pointed out, both by appellant and appellee, the sole issue of this case is whether or not the memorandum opinion of July 31, 1950, is a final, appealable order. To justly decide this question, it is absolutely necessary to look at the nature of the proceedings in which the memorandum opinion was rendered.

Obviously, neither the appellant, the appellee, the district judge nor the court clerk considered the proceedings as a separate civil action. This is evident from the fact that the proceedings carry the same old docket number as the original action. The true factual substance of the proceeding clearly shows that the proceedings were nothing more than a supplemental application to the Court for an order to assist the appellee in procuring the remedy set forth in the original judgment.

Expressed in other words, it was a proceeding for civil contempt to assist the appellee in procuring the remedy set forth in the original judgment. Appellant constantly refers to the proceedings as involving "constructive contempt" but this again is but a half-truth. True, the acts of appellant were not performed in the presence of the Court, but it is well recognized that constructive contempt pertains to those acts which tend to belittle, degrade or embarrass the Court or the administration of justice. However civil contempt, whether the act be committed in the presence of the Court or some distance from the Court, is not

a proceeding to remedy a wrong against the Court, but merely remedial assistance to the party aggrieved. However, it is admitted that in some instances civil contempt can also amount to criminal contempt, but such is not this case.

That such is the law and is well recognized in this circuit can be seen from the case of *Fenton v. Walling*, 139 F. (2d) 608. See also 13 C. J. 5, 6.

**A contempt proceeding is not a civil action within the ordinary meaning of those words as used in the Federal Rules of Civil Procedure.**

It is well recognized that contempt proceedings are unique in the law. As such, contempt proceedings were never considered as being legal or equitable. All courts have an inherent power to adjudge contempt; if not, their orders would be but a hollow mockery. In the case of *Edward E. Bessette v. W. B. Conkey Company*, 194 U.S. 324, 24 S.Ct. 665, the Court stated:

“A contempt proceeding is *sui generis*. \* \* \*”

It is well recognized that in adopting the Federal Rules of Civil Procedure, and in particular Rules 1 and 2, the words used therein were given their ordinary meaning. Yet it has always been well recognized that contempt proceedings are neither civil actions nor prosecutions for offenses. That such is the rule is well stated in the case of *Myers v. United States*, 264 U.S. 95, 44 S.Ct. 272, as follows:

“None of the cited Code sections makes specific reference to contempt proceedings. These are *sui*

generis—neither civil actions nor prosecutions for offenses, within the ordinary meaning of those terms—and exertions of the power inherent in all courts to enforce obedience, something they must possess in order properly to perform their functions. *Bessett v. W. B. Conkey Co.*, 194 U. S. 324, 326, 24 Sup.Ct. 665, 48 L.Ed. 997.”

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**FINDINGS OF FACT, CONCLUSIONS OF LAW AND A FORMAL JUDGMENT ARE NOT NECESSARY UNDER THE CONTEMPT PROCEEDINGS AS PRESENTED IN THIS CASE.**

As pointed out above, contempt proceedings are *sui generis* and not a civil action within the ordinary meaning of the term. That this general rule is applicable in this case is apparent from the fact that the proceedings were not given a separate docket number but were merely carried forward as part of the original action.

It is submitted that, as a matter of substance and fact, the proceedings herein, from which the memorandum opinion resulted, was but the result of a written application to the Court for an order which set forth the particular grounds for the order and the relief sought.

This being the true substance of the proceeding, it becomes apparent that Rule 7(b) of the Federal Rules of Civil Procedure is the applicable rule.

Rule 7(b) provides as follows:

“(b) Motions and Other Papers.



“(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

“(2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.”

See also 3 Cyc. of Fed. Proc. Forms 37, Sec. 1653, which states as follows:

“Civil contempts are instituted and tried as part of the main suit and are between the original parties. There is no federal statute fixing the procedure in civil contempt proceedings, and the practice is not uniform. However, there are two general methods of procedure. The one is by petition for attachment, supporting the petition by one or more affidavits, if deemed necessary. The other, and perhaps the more common practice, is by motion or petition and rule to show cause.”

The substance of the proceedings being nothing more than a motion for civil contempt, then the applicable rule as to findings of fact and conclusions of law is well set out in the last sentence of Rule 52(a) of the Federal Rules of Civil Procedure which states:

“Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules



12 or 56 or any other motion except as provided in Rule 41 (b)."

It is therefore submitted that as a matter of law it is not absolutely essential in this contempt proceeding that there be set forth in elaborate detail the findings of fact. However, it is admitted that the better procedure would call for some clear indication as to the facts on which the order is based, such as the district judge did in this case.

That such is the rule is set forth in the case of *Aerovox Corporation v. Concourse Electric Co., Inc.*, 90 F. (2d) 615, as follows:

"There were no findings of fact or conclusions of law filed below, though a memorandum was filed, indicating the basis of the order made. The better practice requires a finding of facts which will make it clear what conduct has been held contemptuous, though the failure to do so is not necessarily fatal. *Ryals v. United States (C.C.A.)* 69 F.(2d) 946. And here the violation of the terms of the supplemental injunction by Sade Levenberg has been made to appear."

The recent case of *Eskay Drugs, Inc. et al. v. Smith, Kline & French Laboratories*, 89 USPQ 202, (April 20, 1951, C.A. 5C.), clearly indicates that an appeal can be taken from a mere order of contempt. The Court of Appeals for the Fifth Circuit, in taking jurisdiction of an appeal from an order of contempt, stated the following:

"This appeal is from an order making absolute a rule to show cause and holding appellants to

be in violation of the provisions of a consent decree which, by injunction, prohibited their use of appellee's registered trade mark 'Eskay,' or any colorable imitation thereof."

\* \* \* \* \*

"\* \* \* On February 21, 1950, the lower court entered an order which held appellants' response insufficient, and, without receiving evidence from either side, further held that the name 'Enkay,' adopted by the appellants, was a colorable imitation of the word 'Eskay,' in violation of its decree."

It is interesting to note that the Court uses the term "in violation of its decree" which is substantially the same language used by Judge Erskine in present order of contempt.

This Court, in the case of *Cutting v. Van Fleet*, 252 Fed. 100, held that the proper procedure in seeking a review from an order of contempt is by appeal. This Court, in discussing the procedure of review of an order of civil contempt, said:

"The order of March 11, 1918, is sought to be reviewed here by writ of error. Under the provisions of Act Sept. 6, 1916, c. 448, 39 Stat. 726, the cause will be deemed to be in this court by appeal, since the contempt charged is a civil contempt arising in connection with a suit in equity for disobedience of an order made to preserve and enforce the rights of a private party, and administer the remedy to which he is entitled, and is therefore reviewable only by appeal. *Wilson v. Calculagraph Co.*, 153 Fed. 961, 83 C.C.A.

77; *Heller v. National Waistband Co.*, 168 Fed. 1020, 93 C.C.A. 670; *Clay v. Waters*, 178 Fed. 385, 392, 101 C.C.A. 645, 21 Ann. Cas. 897; *Merchants' S. & G. Co. v. Board of Trade of Chicago*, 201 Fed. 20, 26, 120 C.C.A. 582."

The Second Circuit Court of Appeals in the case of *Heller v. National Waistband Co.*, 168 Fed. 249, reached the same conclusion that an appeal lies from an order of contempt, stating:

"PER CURIAM. It is well settled that, when an order imposing a fine for violation of injunction is substantially one to reimburse the party injured by the disobedience, it is to be reviewed only by appeal. Writ of error will lie only when the fine is clearly punitive, and in vindication of the authority of the court, as is the case where the fine is made payable in whole or in part to the United States. *Matter of Christensen Eng. Co.*, 194 U. S. 458, 24 Sup. Ct. 729, 48 L.Ed. 1072.

"The writ of error is dismissed. Defendant's remedy is by appeal."

The Sixth Circuit, in the case of *Auto Acetylene Co. v. Prest-O-Lite Co.*, 276 Fed. 534, entertained an appeal from an order of contempt.

The First Circuit has ruled similarly in the case of *Wilson v. Calculagraph Co.*, 153 Fed. 961.

This rule is uniform and has been recognized and applied by many of the Courts of Appeals.

This rule is well recognized in this circuit and is evidenced by the district judge's own statement on

the hearing of defendant's motion to recall, quash or stay writ of execution and entry of judgment. (Tr. pp. 101-126.) At page 117 of the transcript of record the district judge states as follows:

"That was what I just said, I have never been aware that in a contempt proceeding it was necessary to file findings and conclusions of law, the same as you would on an original judgment."

\* \* \* \* \*

"If I can I want to give any litigant before me a chance to appeal from my decision, but still I felt that this was just my final word on the subject; I had no idea that any findings should be filed and conclusions of law should be filed, or any special judgment filed. The order, as I read it, shows that on its face."

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**THE MEMORANDUM OPINION DISPOSES OF ALL ISSUES NECESSARY TO RENDER IT A FINAL DECISION FOR CIVIL CONTEMPT.**

Appellant states in his brief (pp. 14-16) that the memorandum opinion is not a final decision in that it does not dispose of all issues. Also appellant, in a back-handed fashion, indicates that the proceedings were not contempt proceedings but were in the nature of proceedings to amend and clarify the original judgment. For the appellant to make such contentions is beyond comprehension.

Appellant completely overlooks the well recognized rule that a prayer for relief never raises an issue of fact. As can be seen from the prayer of the petition for order to show cause (TR pp. 17-27) the appellee



prayed for a great many things, which were not granted, but the prayer clearly did not create any issues.

The district judge recognized this general rule and followed it explicitly. In fact the appellant raised this very same point at the hearing on order to show cause. (TR pp. 69-96.) Appellant clearly pointed out to the Court that in a contempt proceeding it was improper to seek relief by way of expanding the original judgment. Appellant cited several cases and presented them to the Court. Thus there can be no doubt that the district judge was fully aware of his powers on the contempt proceedings.

After the rendering of the memorandum opinion, and at the hearing of appellant's motion to recall quash or stay writ of execution (TR pp. 101-126), appellant again raised the very same point. In the transcript of record, page 122, there appears the following:

"Mr. Naylor. \* \* \* and as a matter of fact Mr. Hursh has referred to the fact they prayed for something more than contempt, namely, a supplement of Your Honor's original judgment. You remember that point was discussed.

The Court. Yes, I think I refused to give it.

Mr. Naylor. That is true, that is true, but I think the refusal was in the matter of form, but not substance."

Thus it is obvious that the Court has in fact passed on every basic issue but has denied appellee certain relief asked for in the prayer.



**THE APPELLANT'S CONTENTION THAT THE PROCEEDINGS WERE SOMETHING OTHER THAN CONTEMPT IS A FLAGRANT IGNORING OF THE OBVIOUS AND IS OF NO EFFECT.**

In appellant's brief, pages 14-16, appellant asserts that the proceedings were something other than contempt proceedings. This is ridiculous.

The order to show cause was directed to appellant and ordered him to show cause why he should not be punished for contempt. (TR p. 38.)

Throughout the entire findings of the district judge, as set forth in the memorandum opinion, there is the statement that appellant has not complied with the judgment of this Court. Obviously, language of that character is used only in contempt proceedings.

Also, the last paragraph of the memorandum opinion clearly shows that the district judge considered the proceedings as being solely for contempt, because he said:

"It is further Ordered that defendant pay to plaintiff a reasonable attorney's fee, to wit, the sum of \$500.00 for services of plaintiff's attorneys in the commencement and prosecution of said contempt proceedings."

Conceding, purely for the sake of argument, that there may have been error in the nature of the relief granted in the order of the memorandum opinion, such error is not now subject to appeal. This is so for the following reasons:

The order as set forth in the memorandum opinion was the result of a contempt proceedings. There being

no specifically designated procedure for contempt proceedings and this order being entered in the Court's docket as the concluding act of the Court, is an appealable order. The time to appeal from that order having lapsed, this Court can no longer take jurisdiction to correct that order.

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**APPELLANT'S CONTENTION THAT ORDER OF CONTEMPT IS INCONSISTENT WITH ORIGINAL JUDGMENT IS UNTENABLE.**

Appellant, at pages 14-16 of his brief, compares the provisions contained in the original judgment with those in the order of contempt and reaches the conclusion that the two are inconsistent and irreconcilable. Appellant's argument in this respect is based on the false premise that the proceedings taken pursuant to the order to show cause were not true contempt proceedings. This position of appellant is entirely untenable because the only requirement contained in the order to show cause was that appellant show cause " \* \* \* why he should not be punished for contempt of Court in publishing advertising in connection with the sale of 'Steccone's Master Squeegees' as more fully appears from the petition of plaintiff and the affidavit of Leon Paul \* \* \* ." (TR p. 38.)

The District Court treated the matter as a contempt proceeding and in its memorandum opinion and order of July 31, 1950, found appellant guilty of contempt, using the following language in this respect:

"I find that Exhibits 2, 3 and 4, attached to the affidavit of Leon Paul in support of plaintiff's

claim that the defendant has not complied with the judgment of this court, are violative of that judgment.

\* \* \* \* \*

“I further find that defendant has not complied with the order of this court requiring him to indicate on the squeegees and the handles thereof manufactured and sold by him that they are not the product of Morse-Starrett Products Co.” (TR pp. 96-77.)

The judge then went on and made his order in this case, stating:

“Accordingly, it is Ordered that the defendant forthwith cease and desist from printing, circularizing or using in any manner whatsoever the said Exhibits 2, 3 and 4 or substantial copies thereof and furthermore that he forthwith cease and desist from manufacturing and selling any squeegees or handles thereof marked with the word ‘Steccone’ used alone or in connection with other words or symbols which do not clearly indicate that they are not the product of the Morse-Starrett Products Co.” (TR. pp. 96-97.)

The order contained in the original judgment was in the following language:

“That a writ of injunction issue out of and under the seal of this Court enjoining and restraining the defendant, his associates, attorneys, employees, servants, agents, and those in privity with him, or them, from in any manner using the trade-name ‘Steccone’ enclosed by an oval in connection with squeegees, or the handles thereof, and from so using the name ‘Steccone’ that reasonably

attentive purchasers cannot readily distinguish between the products of plaintiff and defendant, provided, however, that defendant may make, advertise and sell squeegees as the products of the Steccone Products Co., or as defendant's product, so long as the name 'Steccone,' used alone or in conjunction with other words or symbols, on the squeegees or in the written advertising thereof, is accompanied by sufficient explanatory material so as to clearly differentiate it from the product manufactured and sold by plaintiff." (TR pp. 16-17.)

The only difference between the language of the order of contempt and the judgment is that one is phrased in positive language ordering appellant to cease and desist from certain acts while the other sets forth the use of the name "Steccone" by appellant with the imposition of certain conditions in connection with such use. The two provisions are entirely consistent and the only way one could not understand their provisions is for one not to make an honest and reasonable attempt to so understand them.

The appellant having been adjudged guilty of unfair competition by making, selling and advertising squeegees under the trade-mark "Steccone" was required to keep a safe distance from the dividing line between violation of and compliance with the original judgment. In other words, the appellant, in employing the trade-mark "Steccone" in any manner, acted at his peril. The language employed by Judge Holmes of the Court of Appeals for the Fifth Circuit in the



case of *Eskay Drugs, Inc. v. Smith, Kline & French Labs.*, 89 USPQ 202, 203, expresses the rule as follows:

“In such a case as this, where the appellants have been found guilty of infringing the trade mark rights of others, they should thereafter be required to keep a safe distance away from the dividing line between violation of, and compliance with, the injunction. They must do more than see how close they can come with safety to that which they were enjoined from doing.”

The Supreme Court, in considering acts of criminal contempt in the case of *United States v. United Mine Workers of America*, 67 S. Ct. 677, 695, said the following:

“\* \* \* The defendants, in making their private determination of the law, acted at their peril. Their disobedience is punishable as criminal contempt.”

It is thus submitted that the only possible way appellant could be confused by the language employed by the District Court in its judgment and its order of contempt was to make a studied effort at becoming confused and closing its eyes to the true meaning and intent of the language employed by the District Court. The District Court couched its judgment and its order of contempt in the usual and customary language employed by all Courts in trade-mark and unfair competition matters where the defendant was found guilty of unfair competition by causing confusion in the trade between a trade-mark employed by said defendant and that of the complainant.



It is submitted that this alleged confusion of appellant is merely a sham defense.

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### CONCLUSION AND SUMMARY.

It is quite obvious to all parties concerned that the proceedings out of which the District Court issued its order as contained in the memorandum opinion were for contempt. A contempt proceeding being *sui generis* is not a true civil action and as such the ordinary rules of civil procedure are not fully applicable. In contempt proceedings it is not essential that there be findings. Under the facts of the present case, the District Court did make ample findings so as to clearly show the basis of the decision.

However, even if this were an ordinary civil action and not a strict contempt proceeding, the memorandum opinion as signed, filed and entered on July 31, 1950, is in strict compliance with the general rules as set forth in the Federal Rules of Civil Procedure and the Local Rules. This is so, particularly in view of Rules 52 and 58, of the Federal Rules of Civil Procedure and Rule 5 of the Local Rules.

It is respectfully submitted that the District Court committed no error in denying appellant's motion to enter judgment and the order should be affirmed.

Further the appeal should be dismissed because of failure of appellee to take an appeal from the order of July 31, 1950.

This action has been needlessly vexatious and expensive to appellee and therefore it is respectfully requested that appellee be awarded reasonable attorneys' fees.

Dated, San Francisco, California,  
May 18, 1951.

Respectfully submitted,

MELLIN, HANSCOM & HURSH,  
*Attorneys for Appellee.*

No. 12,770

IN THE  
United States  
Court of Appeals  
For the Ninth Circuit

ETTORE G. STECCONE, an individual doing  
business under the firm name and style  
of STECCONE PRODUCTS Co.,

*Appellant,*

VS.

MORSE-STARRETT PRODUCTS Co., a corpora-  
tion,

*Appellee.*

Reply Brief for Ettore G. Steccone

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*Of Counsel*



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MORSE-STARRETT PRODUCTS Co., a corpora-  
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*Appellee.*

---

Reply Brief for Ettore G. Steccone

---

Appellee's Brief does not require an extensive or detailed reply. The contentions presented in appellant's opening brief have not been impeached and will not be reargued.

At the outset it should be noted that this appeal does *not* present for determination any such trifling proposition as that recited at page 6 of appellee's brief, to wit:

"Basically, the sole issue of this appeal is whether or not an appealable decision must be labeled or entitled 'Judgment'."

On the contrary, this appeal presents the question whether the District Court's Memorandum Opinion handed down on July 31, 1951 constituted a final, appealable order or was it simply a decision advisory in nature and to be implemented by Findings of Fact, Conclusions of Law and a Judgment, as called for in the rules (Appellant's Opening Brief, p. 4). Appellee fully concedes this to be the question here presented for determination by recognizing it at pages 5, 8 and 19 and so directing its arguments.

### **THE ALLEGED INCONSISTENCIES OF APPELLANT'S POSITION**

Appellee has alluded to the alleged inconsistency in appellant's argument that the Memorandum Opinion of July 31, 1951 needed to be implemented by findings, conclusions and judgment and appellant's apparent failure to lodge proposed findings, conclusions and judgment to implement the order of November 9, 1950 denying the Motions to Recall Writ of Execution and for Entry of Final Judgment, from which this appeal was taken. In this make-weight argument (Brief, pp. 4, 6-7) appellee completely ignores R.C.P. Rule 52(a), the pertinent part of which is as follows:

“\* \* \* Findings of fact and conclusions of law are unnecessary on decisions on motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b). As amended Dec. 27, 1946, effective March 19, 1948.”

Since the order here appealed from (Tr. p. 126) was not a decision on a motion under Rule 12 (the pleading motions) or Rule 56 (summary judgment motions) and did not partake of dismissal of the action (Rule 41(b)), it fol-

lows that there was absolutely no call for findings and conclusions as a condition precedent to this appeal.

Elsewhere in appellee's brief (pp. 7-8; 12-13) the argument is made that since appellant failed to prepare, serve and lodge findings and conclusions to implement the Memorandum Opinion of July 31, 1950, pursuant to Local Rule 5(e), his rights are lost or have been waived. This is like an attempt to make bricks without straw, since Rule 5(e) imposes no such obligation upon a losing party (appellant here) as it does upon the prevailing party (appellee here). By its plain language Local Rule 5(e) imposes a positive *obligation* upon the prevailing party in the use of the mandatory word "shall," whereas it is *permissive* in its provision that the adverse or losing party "may" lodge his proposals in the event of failure by the prevailing party to comply.

Nor is appellee at all warranted in implying that the failure of an adverse or losing party to proceed according to the permissive provisions of Local Rule 5(e), constitutes a waiver of any of his rights, since that construction went by the boards in the adoption of the 1944 edition of the rules.\*

There can be no such thing as a *conditional* final judgment, ripening into a final judgment *nunc pro tunc* merely upon the failure of the parties to take timely action under Local Rule 5.

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\*The former local rules adopted and in effect December 1, 1933, with amendments to April 6, 1936, and specifically Rule 42, upon which present Rule 5(e) is in part based, contained this provision: "A failure to comply with the requirements of this rule may be deemed to be a waiver by the party so failing." It is significant to note that there is no such provision in Local Rule 5.



**THERE IS NO AUTHORITY FOR APPELLEE'S CONTENTION THAT  
CIVIL CONTEMPT PROCEEDINGS LIE OUTSIDE OF THE FED-  
ERAL RULES OF CIVIL PROCEDURE.**

At page 20 of its brief appellee freely concedes that the proceedings below were for civil contempt, but appellee goes on to say, in effect, that a civil contempt proceeding is not a "civil action" within the ordinary meaning of those words as they are used in the Federal Rules of Civil Procedure. Presumably appellee is here taking another fork in the road in an effort to lead this Honorable Court into the belief that there are no rules, either in the Rules of Civil Procedure or in the Local Rules, governing contempt proceedings. We assume that by the same token it is appellee's reasoning that each court shall be free to make its own rules concerning contempt and to ignore precedents and the rules set up for the safeguard of the rights of litigants including those rules which were established for the conduct of the principal proceeding in which contempt may arise. The chaos to which such a situation would lead can well be imagined.

The alleged authorities cited by appellee at page 20 of its brief do not support any such fantastic proposition. It is true that in *Edward E. Bessett v. W. B. Conkey Co.*, 194 U.S. 324, the statement appears that contempt proceedings are *sui generis* but it should be noted that that case determined the question of whether under the Circuit Court of Appeals Act, the appellate court had jurisdiction to review a judgment finding a person not a party to the suit guilty of contempt in violating a restraining order. The Supreme Court held that it had such power, by writ of error.

*Myers v. United States*, 264 U.S. 95, involved a challenge of the jurisdiction of a district court to try and punish one



for contempt of an order in the commission of certain acts in another division of the same district, and arose in certain labor disputes under the Clayton Act. But neither of these alleged authorities can be taken as an all-time definition of contempt proceedings as "a breed of cats" lying wholly outside of the Federal Rules of Civil Procedure and Local Rule 5.

**THE NATURE OF THE CONTEMPT PROCEEDINGS BELOW WAS SUCH AS TO REQUIRE FINDINGS, CONCLUSIONS AND JUDGMENT.**

Attention is next turned to that part of appellee's brief (pp. 21-33) which stands for the proposition that the proceedings below were of such character as to be properly disposed of by a simple order on appellee's petition for an order to show cause why appellant should not be adjudged in contempt.

Appellee first alludes to the *modus operandi* it employed to bring the matter before the District Court, terming it a "written application to the court for an order" (Brief, p. 21). Reasoning thus appellee terms the matter as "nothing more than a motion for civil contempt" (Brief, p. 22), treating the concluding sentence of R.C.P. Rule 52(a) as applicable to the extent that findings and conclusions are unnecessary.

The shortcoming of that argument is demonstrated by the fact that *in substance* the entire proceeding below amounted to an action tried upon the facts, within the meaning of Rule 52(a), rather than to a motion within the meaning of that word which was intended to be conveyed by the last sentence of the same rule. Certain it is that there was a final hearing and submission of the contempt matter and nothing further was required to dispose of it save and

except a definitive judgment, properly based upon findings and conclusions. Such being the case, it was an action "tried upon the facts without a jury" within the meaning of that phrase in the forepart of Rule 52, calling for findings and conclusions and a directive that judgment be entered. Since it followed the final judgment in the case (Tr. 14-17) there was nothing interlocutory about the trial of the contempt matter, and the concluding sentence of Rule 52(a) did not apply.

Looking to substance rather than form, it will be seen that the contempt proceedings involved the following:

(a) Appellee's Petition for Order to Show Cause, tendering issues of fact and law (Tr. 17-34).

(b) An affidavit of Leon Paul submitting facts said to support the petition (Tr. 35-37).

(c) The Order to Show Cause (Tr. 38).

(d) An affidavit of E. P. Gilsdorf on the order to show cause as a part of appellant's reply (Tr. 39-40).

(e) An affidavit of appellant as a further part of his reply (Tr. 41-67).

(f) A hearing (Tr. 69-95) including testimony in open court (Tr. 88-95).

It is difficult to conceive of a proceeding that would partake more of the substance of "actions tried upon the facts without a jury" or coming within the purview of Rule 52(a) and its requirement for findings, conclusions and the directing of entry for judgment, than did the proceedings below. It is, therefore, respectfully submitted that the important thing is what was done, not what it was called.\*

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\*It is interesting to note that the law of California calls for findings and conclusions in cases involving "a trial of a question of fact" without concern for the procedure by which that question is raised (Calif. C.C.P. § 632).

**THE MEMORANDUM OPINION DID NOT  
SATISFY THE GOVERNING RULE**

Appellee urges (Brief, pp. 23-24 and 26-29) that the District Court's Memorandum Opinion (Tr. 96-97) satisfied the rule with respect to findings and conclusions, if it be assumed that such were required.

The cases cited by appellee for this proposition are not in point. *Concourse Electric Co., Inc. v. Aerovox Corporation*, 90 F.(2d) 615 (Appellee's Brief, p. 23) stands simply for the proposition that in that case the remedy for contempt was the enforcement of a supplemental injunction for patent infringement. There was no interpretation or enlargement of the injunction involved and hence there was no need for findings or conclusions. So also *Eskay Drugs, Inc. et al. v. Smith, Kline & French Laboratories*, 89 USPQ 202 (Appellee's Brief, p. 23) involved merely the question:

"Thus we have left for decision the sole question of whether appellants' use of the word 'Enkay,' in the same way it had previously used appellee's trade mark 'Eskay,' is a colorable imitation of the trade mark 'Eskay'."

**SINCE THE MEMORANDUM OPINION VARIED THE LINE OF  
DEMARCATIION BETWEEN VIOLATION AND COMPLIANCE,  
THERE WAS A GRAVE NEED FOR FINDINGS, CONCLUSIONS AND JUDGMENT.**

Appellant perceives no need to reply in detail to appellee's attempted reconciliation between the original Judgment (Tr. 14-17) and the Memorandum Opinion (Tr. 96-97), preferring to rest upon those rulings set in apposition (Appellant's Opening Brief, pp. 14-16). It is noted that appellee concedes that there is a difference between them (Appellee's Brief, p. 31) and that appellee strives unsuccessfully to demonstrate a degree of compatability.

It is respectfully submitted that the actual differences between the original judgment and the language of the Memorandum Opinion sets up a "wavering fence" or an uncertain line of demarcation between violation of and compliance with the original judgment, which is a wholly unsatisfactory termination of proceedings the purpose of which is to mark off the boundaries of proper and improper commercial marking of goods. What "line of demarcation" is the appellant to follow: the original line, the revised line or some ephemeral blending of portions of those lines? It is respectfully submitted that the ends of justice are best served by something more definite than this, and that the imperative need for findings of fact, conclusions of law and a judgment implementing the Memorandum Opinion is plainly indicated.

### CONCLUSION

Appellee has conceded (Brief, p. 31) that there was a difference between the language of the original judgment and the Memorandum Opinion handed down on Appellee's Petition for Order to Show Cause why appellant should not be adjudged in contempt. When examined, those differences will be found to be substantial and to call for a windup of the matter in accordance with R.C.P. Rule 52(a) and Local Rule 5.

In connection with the requirement of Rule 52(a) that the facts be found specially, this Honorable Court's attention is directed to the case of *National Popsicle Corp. v. Icy-clair, Inc.*, 119 F.(2d) 799, 79 USPQ 627, wherein, the facts not having been found specially, as required by Rule 52(a), this court vacated the judgment of the court below, with directions that a proper judgment be entered after the



proper findings had been made. It is believed that, in like manner, this court could and should direct that the Memorandum Opinion of July 31, 1950 (insofar as it purports to be a judgment) in the subject contempt proceeding be vacated, to be followed by the entry of a proper judgment supported by adequate findings of fact and conclusions of law. This end result can be reached by reversing the District Court's Order of November 9, 1950 denying appellant's Motion for an Order Recalling the Writ of Execution and for Entry of Final Judgment.

Dated May 31, 1951

Respectfully submitted,

NAYLOR AND LASSAGNE

JAS. M. NAYLOR

*Attorneys for Appellant.*

FRANK A. NEAL  
*Of Counsel*





No. 12,770

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Petition for Rehearing

---

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Petition for Rehearing

---

*To the Honorable William Denman, Chief Judge, and to  
the Circuit Judges of the United States Court of Ap-  
peals for the Ninth Circuit.*

The appellant, Ettore G. Steccone, after carefully analyzing the opinion filed in this Court on July 23rd, 1951, respectfully petitions for a rehearing. In support of this petition appellant sets forth the following as broad and

compelling reasons as to why this Honorable Court should grant a rehearing:

1. The lay personnel in the District Court clerk's office will be required to interpret, and thus be given the power to alter the effect of, the memorandum opinions of the District Courts.

2. The appellate jurisdiction of this Honorable Court thus will henceforth be needlessly subjected to doubts.

3. The only safe course for counsel will be: "File an appeal and let all questions of propriety of the same be resolved by the Court of Appeals."

The grounds for this petition are set forth in the following memorandum of points and authorities.

This Honorable Court in its opinion, pages 4 to 6, inclusive, holds that the "Memorandum Opinion" was the final judgment of the Court and as such was duly entered by the clerk, satisfying Rule 79a.

An analysis of that phase of the decision discloses that it rests on four propositions which will not withstand careful analysis. The first three propositions rely on one cited authority each—and in each instance the reliance is misplaced—at least without a further consideration of this matter by this Honorable Court. For the fourth proposition, no authority is cited. It is our purpose here to highlight these deficiencies, since this matter is of importance not alone to your petitioner, but as is evidenced by the large number of cases involving the appealability of orders, to the bar in general.

Before undertaking this task, we wish to indicate our awareness of the following three rules of practice, not in dispute, which should be stated here as background:

1. If a judgment is not final in fact, it will not be rendered so merely by "appropriate" docket entries.

*Uhl v. Dalton*, 151 F.(2d) 502 (C.C.A. 9);

*Wright v. Gibson*, 128 F.(2d) 865 (C.C.A. 9, 1942).

2. If the judgment is final in fact, merely filing it with the clerk will not commence the running of the time to appeal.

*St. Louis Amusement Co. v. Paramount Film Distributing Corp.*, 156 F.(2d) 400 (C.C.A. 8, 1946).

3. If the judgment is final in fact, there must be docket entries satisfying Rules 58 and 79(a) in order that an appeal can be taken.

*Healy v. Pennsylvania R. R.*, 181 F.(2d) 934 (C.C.A. 3, 1950) cert. denied, 340 U.S. 935;

*Fast, Inc. v. Shaner*, 181 F.(2d) 937 (C.C.A. 3, 1950).

The four propositions with which we quarrel may be briefly stated:

I. The "Memorandum Opinion" was a judgment which could become final by due entry in the docket.

II. There was a due entry in the docket.

III. The signature of the District Judge constituted both an "approval and settlement" of form and a direction to the clerk to enter.

IV. The District Court could, despite local Rule 5(d) dispense with the aid of counsel in preparing, approving and settling a judgment of the type herein involved.

## I.

**THE FINALITY OF THE "MEMORANDUM OPINION"**

To reach its holding that the Memorandum Opinion of July 31, 1950 was final, this Court cited and relied on but one case: *In re Forstner*, 177 F.(2d) 572 (C.C.A. 1, 1949). The very pages referred to by this Court, however, contain language which at most indicates only that mandatory language at the end of an opinion may or may not be the final decision of the Court. The test, of finality, in the language of the Court in the *Forstner* case is:

"Whether such a judgment has been rendered depends primarily upon the intention of the court, as gathered from the record as a whole, illumined perhaps by local rule or practice." (P. 57 of 177 F.(2d))

It should be noted that this is no test of subjective intent. It is one to be applied by looking at the record as a whole; by looking to the local rules and the traditions of practice; and, it is submitted, by considering all of the actions taken or omitted by the clerk of the Court, who plays an indispensable role in perfecting the appealability of the judgment. The role of the clerk is illumined by the recent case of *Fast, Inc. v. Shaner, supra*, in which the Court said, at page 938 of 181 F.(2d):

"\* \* \* in the interest of practical administration, we note that the instant case highlights the inadvisability of imposing upon lay personnel in the office of the Clerk of the District Court, who make the docket entries, the responsibility of examining the body of an opinion to find dispositive language, and to interpret the intendment of the Court. Rule 79, Federal Rules of Civil Procedure, requires the substance only

of orders and judgments, which are generally terse and definitive, to be entered on the docket; merely the nature of other papers need be noted. Here as in the Healy case, the opinion of the court below was docketed and entered consistent with its title and tenor as an opinion, which is all that could be justifiably required of the Clerks' office, and accordingly the notices necessary under Rule 77(d) with respect to orders and judgments were not sent. We reiterate, the primary responsibility rests upon the litigants to see to it that their record is in proper form at all times."

Applying the aforementioned test, the "Memorandum Opinion" is not a final decision. A recapitulation of the factors indicating "finality" compared with the factors indicating "lack of finality" will demonstrate, it is submitted, the error of this Court in holding that the "Memorandum Opinion" could be made final by due entry.

### **Factors Indicating Finality**

1. *Subjective intent of the District Judge.* This certainly is not a true criterion measured by the foregoing tests. (Cf. *Hoiness v. U. S.*, 165 F.(2d) 504, reversed on other grounds, 335 U.S. 297.)

2. *Mandatory language at conclusion of the opinion.* This is equivocal. (*In re Forstner, supra.*)

3. *Signature of the Judge.* This is equivocal. At the least, it indicates he approved his own opinion. At the most, it is equivalent to settlement and approval *and* a direction to the clerk to enter. The latter we discuss below.

4. *The first of two docket entries of July 31, 1950.* It is dated and contains the substance of the "order" and the



name of the judge. While this may satisfy part of Rule 79(a), below we demonstrate its failure to satisfy *all of* Rule 79(a).

### **Factors Indicating Lack of Finality**

1. *The document was entitled "Memorandum Opinion" and not "Memorandum Opinion and Order" or "Order" or "Judgment."* This is not a point based on empty words alone: Footnote 10 in *Healy v. Pennsylvania R.R.*, *supra*, states:

"It may be suggested that, where this procedure is adopted, the document might be entitled as an opinion and order, thus removing from lay personnel in the Clerk's Office the responsibility of interpreting the nature, effect and intendment of the document." (P. 937 of 181 F.(2d))

2. *The clerk did not mail notices of entry of judgment to the parties as required by Rule 77(d).* All that was done was to mail the opinion. Formerly, the failure to mail notices of entry was fatal. *Hill v. Hawes*, 320 U.S. 520 (1944). True, the present rule as amended avoids that result. But the failure to send such notices is significant in demonstrating that the clerk did not act as he was obliged to act when dealing with a final order. *In re D'Arcy*, 142 F.(2d) 313 (C.C.A. 3, 1944); *Healy v. Pennsylvania R.R.*, *supra*.

3. *The clerk did not note in the docket the mailing of such notices of entry as required by Rule 77(d).* All that was done was to note the mailing of the opinion. Proper notices of entry were mailed in connection with the original judgment of January 11, 1950 (Tr. of R. p. 129) and also in connection with the order denying appellant's mo-

tion for entry of final judgment (Tr. of R. p. 132). The clerk thus demonstrated that he knew how to act when dealing with a properly submitted final judgment and the parties were thus caused to believe that they could rely upon receiving notices of entry in a situation where a judgment, final within local tradition and practice, was entered.

4. *The clerk did not have the "Memorandum Opinion" microfilmed (a local practice) pursuant to Rule 79(b) requiring that a "correct copy of every final judgment or appealable order \* \* \*" be kept.*

5. *The clerk refused to issue a writ of execution on the "Memorandum Opinion" for attorneys' fees awarded therein until compelled to do so by a special court order.*

6. *RCP 58, as supplemented by local Rule 5(d) was not observed by the District Court or by the prevailing party. Conformance to rules and practice is specifically enjoined as a condition to the finality of a judgment—particularly where the document is ambiguous. United States v. Hark, 320 U.S. 531, 534 (1944); In re Forstner, supra; and in Healy v. Pennsylvania R.R., supra, the Court states:*

*"We are not oblivious of the trend away from those niceties which so often in the past harassed both litigants and the courts. But we are not here insisting upon mere satisfaction of barren formal technicalities. Howsoever liberal we may wish to be, it cannot be gainsaid that certain formalities are indispensable to 'speedy, just, and inexpensive litigation,' and these attributes of our federal judicial system are forthcoming only upon adherence to, rather than upon rejection of, the Rules. It is of the highest importance that the appellate function be free of, and protected from, the needless jurisdictional doubts so simply*

avoidable by compliance with a few specific instructions. The alternative can but induce a laxity destined to obscure the lines of proper appellate conduct, with consequent expense and hardship to the litigants, whose duty it is in the first instance to see to it that the record is in proper form for the relief sought." (P. 936 of 181 F.(2d))

It should be apparent, then, that while the prevailing party rested on the "Memorandum Opinion"—failing, of course, to comply with local Rule 5(d)—the clerk did not act upon it as if it were the judgment of the Court.

In the light of these factors, the "Memorandum Opinion" was not capable of being transformed into a final judgment merely by an "appropriate" docket entry.

## II.

### THE ENTRY IN THE DOCKET

Even if the "Memorandum Opinion" were a judgment which could become final, the failure of the clerk to enter it properly—the entry only partially satisfying Rules 58 and 79(a)—is fatal and the judgment did not become appealable.

The clerk made two separate and independent entries in the docket on July 31, 1950 (T. of R. pp. 130-1). The first was set forth in dispositive language showing the substance of the Court's order. The second contained no dispositive language, and merely characterized the "Memorandum Opinion." It is clear that under the authorities, e. g., *In re D'Arcy, supra*, the second docket notation would not have been sufficient in and of itself to render the judgment final and appealable.

“It is necessary that a definitive order or judgment be made and entered in the Court’s docket in due form.”

The clerk’s two entries were made in inverse and illogical sequence. The entries indicate that the “order” preceded the Memorandum Opinion, while, actually, the Memorandum Opinion preceded the “order,” which was set forth in the latter part of the opinion.

In making his entries in this manner, the clerk further acted as if the “Memorandum Opinion” were lacking in the qualities of a final judgment.

More importantly, it is submitted that the reversed double entry did not comply with Rule 79(a), requiring that

“All papers filed \* \* \* orders, verdicts, and judgments shall be noted chronologically in the civil docket . . .”

It is submitted that the word “chronologically” calls for entry in logical and properly ordered sequence, and that it is not sufficient that two entries made on the same day bear the same day of the month date. Such interpretation is clearly supported by the fact that Rule 79(a) elsewhere requires:

“The notation of an order or judgment shall show the date the notation is made.”

Clearly, if the opinion and order were separate papers and were transmitted to the clerk at the same moment, Rule 79(a) requires that the notation of the order be made after the notation of the opinion. The situation is no different where, as here, the order is set forth in the opinion.

The reason for the ordered sequence chronology is obviously for the convenience of all concerned with the docket, i.e., so that they may rely on the last docket notation as



pinpointing the latest status of a case. Petitioner, here, placed such reliance on the second entry, and it was not until the very eve of the hearing on petitioner's motion for entry of final judgment that he learned of the prior order entry.

If the first of the double entries of the clerk is to be given effect, or if both entries, though separate, are to be read together, it would be only logical to also conclude that the due entry by the clerk of a judgment may be made in any vacant space appearing on the folio of the docket assigned to the action, as long as the notation bears its proper date. Such errancy, though violative of the rule, might be overlooked if the clerk were to follow through with the mailing of notices of entry to the parties, but that was not done here.

The failure of the clerk to make proper entry prevented the "Memorandum Opinion," if it was a judgment, from becoming appealable.

### III.

#### **THE JUDGE'S SIGNATURE AS CONSTITUTING SETTLEMENT AND APPROVAL OF FORM OF JUDGMENT AND DIRECTION TO ENTER.**

A. The case of *J. E. Haddock, Ltd. v. Pillsbury*, 155 F.(2d) 820 (C.A. 9, 1946), brought to this Court's attention after the hearing on appeal, and relied upon by this Court in reaching the conclusion that the "Memorandum Opinion" can properly be treated as a final judgment, is readily distinguishable.

B. Unlike the situation presented in *Haddock v. Pillsbury*, the rules of practice, as applicable to the present case, required the district judge to direct the clerk to enter judgment by something other than his mere signature.



Rule 58 provides, in part:

“When the court directs that a party recover only money or costs or that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk.”

Thus Rule 58, in so far as we are concerned with it here, provides for two categories of judgments: one, as in the Haddock case (the complaint was dismissed), where the court “directs that a party recover only money or costs or that all relief be denied,” and the other, as in the present case, where the court “directs entry of judgment for other relief,” in respect of which latter category Rule 58 goes on to state that “the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk.” Since the Haddock case is distinguishable from the present case within the terms of the rule, the ruling of the Court in the former that the Judge’s signature constituted a direction to enter judgment is not applicable to the present case.

It is submitted that where, as here, there is a requirement, first, for settlement and approval of the form of judgment, and then for a direction to enter, something more than the Judge’s signature on his “opinion” is required in order that there may be due and proper entry of judgment by the clerk.

If this Honorable Court meant to expand the Haddock case ruling to include cases of the second category under Rule 58, the Court is respectfully urged to expressly state

this in order that this point of procedural law may be clarified for the guidance of future litigants. If, on the other hand, the Court did not intend to expand the Haddock rule, then the Haddock case has been misapplied to the case at bar.

#### IV.

#### **AS TO WHETHER THE DISTRICT COURT COULD, DESPITE LOCAL RULE 5(d), DISPENSE WITH THE AID OF COUNSEL IN PREPARING, APPROVING AND SETTLING A JUDGMENT OF THE TYPE HEREIN INVOLVED.**

In its opinion, this Honorable Court reached the conclusion that the activities of the parties in respect to settlement and approval, as called for by local Rule 5(d) are merely in aid of the district court, and that the court may decline such aid by unilaterally playing all of the roles in connection with settlement and approval. Since this Court has cited no authority in support of this conclusion, the soundness of the same must be tested by looking to the relation between RCP 58 and local Rule 5(d), and the mandatory language in which local Rule 5(d) is couched.

#### **(a) The Relation of Local Rule 5(d) to RCP 58.**

The authority for the adoption of local rules of practice by the various district courts is set forth in RCP 83, which provides:

“Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules.”

Pursuant to this authority, the local Rules of Practice of the United States District Court for the Northern Dis-

strict of California were adopted and became effective on July 1st, 1944. It is expressly stated in the forepart of these rules that they supplement the Rules of Civil Procedure. As these latter rules existed in 1944, local Rule 5(d) supplemented RCP 58 so far as the previously mentioned second category of judgments of the latter was concerned.

Since the time of adoption of the local rules, both the local rules and the RCP have undergone certain amendments. The local rules were amended on November 1, 1949, but Rule 5(d) was not amended. RCP 58 was amended in 1947, but there was no change in the substance of the rule, two changes in the rule having been made merely to clarify the practice thereunder. (See commentary note at page cxviii of 10 FRS.)

There having been no change in substance in RCP 58 and no change at all in local Rule 5(d), the latter still supplements the former. Furthermore, since local Rule 5(d) was adopted under RCP 83, containing the proviso that local rules be not inconsistent with the RCP, it must be presumed that there was no inconsistency between local Rule 5(d) and RCP 58 when the former became effective. This presumption carries down to the present time, as there has been no change in either rule which raises a conflict between them.

It is to be concluded, therefore, that local Rule 5(d) and RCP 58 must be read together, since each is a necessary component of the procedural law relating to the entry of those judgments "for other relief." The local rule sets forth in more specific detail within the broader outline of RCP 58 what must be done to conform the procedure to the requirements of law.

**(b) The Mandatory Language of Local Rule 5(d).**

Having seen that the local rule and RCP 58 go “hand in glove” together and that the term “local rule” is merely a name applied to a separately located portion of RCP 58, it will be well to take a detailed look at the local rule to see the stress laid upon the roles to be played by the parties in settlement and approval of the forms of orders or judgments, and the tenor of the language outlining these rules. The rule, pertinent portions of which are appropriately italicized, states:

“Within five days of the decision of the Court giving an order which requires settlement and approval as to form, the *prevailing party shall* prepare a draft of the order or judgment embodying the Court’s decision and present it for approval to each party who has appeared in the action. *Each party shall* examine it at once, and if he approves, endorse with the words ‘Approved as to form, as provided in Rule 5(d),’ and append his signature thereto. *Such endorsement shall not affect the rights of any party, but shall be considered only as an indication to the Judge that the form is correct.* If *any party* does not approve, he *shall* endorse with the words ‘Not approved as to form, as provided in Rule 5(d),’ specifying his reasons. The party proposing the order or judgment *shall* thereupon serve a copy upon each other *party*, and lodge the original and one copy with the Clerk. *Each party* who disapproves the order or judgment *shall* have five days within which to serve and lodge with the Clerk proposed modifications thereof. If *all parties* approve, or if no modifications are presented within said five days, the order or judgment, if approved by the *Judge, shall* be signed and filed by him. *If any proposed modifications of the order or judg-*



*ment are presented as herein provided, the judge shall order such modifications made as he deems proper. If the attorney for the prevailing party fails to observe the above provisions, any attorney in the case may submit to the Judge a draft of the proposed order or judgment."*

The language of the rule apparently leaves no room for the interpretation that the activities of the prevailing party are permissive only, nor is there any room for the prevailing party to decline to prepare a draft of the order or judgment embodying the Court's decision. It will be noted that the Judge has no activity to perform in connection with settlement and approval until the parties first approve or disapprove the form of order or judgment.

In the present case we have the anomalous situation of the prevailing party failing to discharge a required duty, and being enabled by the Court to benefit from its failure.

The district court, in the absence of local Rule 5(d) could by virtue of its inherent power seek the aid of the parties in drafting a suitable judgment. The fact that Rule 5(d) is set forth in such positive and mandatory terms is indicative of the fact that the roles to be played by the parties in the preliminary steps of settlement and approval are for the benefit of the parties, amounting to an actual right. Stated otherwise, the effect of the supplementation of Rule 58 by local Rule 5(d) is that the Court's office of settling and approving the forms of orders and judgments has been, in its formative stages, mandatorily delegated to the parties. If this is so, then the Court may not waive these rights for the parties. The court, having by action of a majority of its judges made and adopted its own



clearly defined rules for the guidance and benefit of parties litigant, must itself abide by and be satisfied with them. The rules are not "a looking glass" to a judicial "never-never" land.

Having seen that conformance to rules and practice is specifically enjoined as a condition to the finality of a judgment (*United States v. Hark; In re Forstner; Healy v. Pennsylvania R.R.*, all *supra*), and having seen the nature of the local rule and the failure of the district court and the prevailing party to observe the same, it can only be concluded that there has been no final judgment in this case.

### CONCLUSION

In view of the above considerations, a granting of the petition for rehearing and a favorable reconsideration of what this Honorable Court has treated as a petition for a writ of mandamus are respectfully solicited.

NAYLOR and LASSAGNE

JAS. M. NAYLOR

*Attorneys for Appellant  
and Petitioner.*

FRANK A. NEAL

*Of Counsel.*

Dated August 22, 1951.

### CERTIFICATE OF COUNSEL

I hereby certify that I am counsel for appellant and petitioner in the above-entitled cause and that in my judgment the foregoing petition is well founded in point of law as well as in fact and that it is not interposed for delay.

JAS. M. NAYLOR

Dated: August 22, 1951.

No. 12771

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United States  
Court of Appeals  
for the Ninth Circuit.

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THELMA D. HAYES,

Appellant.

vs.

FIRST NATIONAL BANK OF FAIRBANKS,  
Executor of the Estate of Louis D. Colbert, de-  
ceased,

Appellee.

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Transcript of Record

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Appeal from the United States District Court,  
for the Territory of Alaska,  
Fourth Division.

FILED

MAY 1951

PAUL P. O'BRIEN,  
CLERK



No. 12771

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United States  
Court of Appeals  
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THELMA D. HAYES,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Attorneys for Appellant.

JULIEN A. HURLEY,  
Fairbanks, Alaska,

Attorney for Appellee.



In the Probate Court for the Territory of Alaska,  
Fourth Division, Fairbanks Precinct

No. 1145

In the Matter of the Estate of  
LOUIS D. COLBERT, Deceased.

PETITION FOR THE PROBATE OF WILL

The petition of Thelma G. Hayes respectfully  
shows:

1.

That Louis Colbert died on or about the 25th day  
of May, 1947, at Fairbanks, Alaska, and was at  
the date of his death a resident of Fairbanks,  
Fourth Division, Territory of Alaska, and left  
property within the Territory of Alaska.

2.

That said decedent left a will which your peti-  
tioner alleges to be the last will of said decedent  
and which is herewith presented.

3.

That the petitioner is named in said will as the  
executrix thereof, and the said petitioner so named,  
consents to act as such executrix.

4.

That the names, ages, relationships and residences  
of the heirs of said decedent, so far as known to  
petitioner are:

## 5.

That the names, ages and residences of the legatees and devisees of the decedent, so far as known to petitioner, are:

Emma Colbert

Thelma G. Hayes, Fairbanks, Alaska.

## 6.

That the character and the estimated value of the property of the estate are as follows:

Real property situated in the Town of Fairbanks, Alaska, and adjacent thereto, consisting of certain lots and dwellings at a value of \$6,000.00.

Certain mining claims in the Territory of Alaska, the exact description and location of which are unknown to petitioner. [1\*]

## 7.

That the subscribing witnesses to the said will are James F. Haynes, Arthur A. Benz and V. A. Cobbell.

## 8.

That at the time said will was executed, to wit: on the said 22nd day of October, 1946, the said testator was over the age of eighteen years, to wit: of the age of 70 years or thereabouts, and was of sound and disposing mind, and not acting under duress, menace, fraud or undue influence, and was in every respect competent, by last will, to dispose of all his estate.

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\*Page numbering appearing at foot of page of original Certified Transcript of Record.



9.

That said will is in writing signed by the said decedent and attested by said subscribing witnesses, at the request of said testator subscribing their names to the said will in the presence of said decedent and in the presence of each other, and your petitioner alleges that said witnesses, at the time of attesting the execution of said will, were and are now competent.

Wherefore, your petitioner prays that the said will may be admitted to probate and that letters testamentary be issued to your petitioner and that for that purpose a time be appointed for proving said will, and that all persons interested be duly notified to appear at the time appointed for proving the same, and that all the necessary and proper orders may be made in the premises.

Dated at Fairbanks, Alaska, this 9th day of June, 1947.

/s/ THELMA G. HAYES,

Petitioner.

United States of America,  
Territory of Alaska—ss.

Thelma G. Hayes, being first duly sworn upon her oath deposes and says: I am the petitioner above named; that I have read the foregoing petition, know the contents thereof, and that the same are true to the best of my knowledge and belief.

/s/ THELMA G. HAYES.

Subscribed and sworn to before me this 9th day of June, 1947.

[Seal]     /s/ J. A. LATHANAN, JR.,

Notary Public in and for  
Alaska.

My commission expires: May 20, 1951.

[Endorsed]: Filed June 11, 1947. [2]

---

[Title of Probate Court and Cause.]

AFFIDAVIT IN SUPPORT OF PROBATE  
OF WILL

United States of America,  
Territory of Alaska—ss.

Warren A. Taylor, being first duly sworn, upon his oath deposes and says: That he is an attorney in practice as such at Fairbanks, Alaska. That on the 22nd day of October, 1946, he was called to the St. Joseph's Hospital at Fairbanks at the request of Louis D. Colbert to draw a will for him. That the said Louis D. Colbert discussed the terms of the said will with affiant and affiant drew the said will and took it to the said Louis D. Colbert who executed the same according to law. That later in the same day the said Louis D. Colbert requested affiant to come to the said hospital as he desired to make a change in said will.

That upon going to the said hospital Louis D. Colbert requested affiant to draw another will for

him as he wished to change the manner of payment of a legacy to his sister. That affiant did draw another will along the lines requested by Louis D. Colbert and sent the same to the hospital where it was duly signed and witnessed according to law.

That at the time of the conversations with affiant, Louis D. Colbert was of sound and disposing mind and memory and in possession of his faculties, and was not acting under duress, fraud or the undue influence of any person whomsoever.

/s/ WARREN A. TAYLOR,

Subscribed and sworn to before me this 6th day of August, 1947.

[Seal] /s/ J. A. LATHANAN, JR.,  
Notary Public for Alaska.

My commission expires May 20, 1951.

[Endorsed]: Filed August 6, 1947. [3]

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[Title of Probate Court and Cause.]

LAST WILL AND TESTAMENT OF  
LOUIS D. COLBERT

Know All Men By These Presents, that I Louis D. Colbert, of Fairbanks, Alaska, being of lawful age and of disposing mind and memory, and not acting under duress, fraud, menace or the undue influence of any persons or person whomsoever, do make, publish and declare this to be my Last Will and Testament in the manner following:

1. I direct that the expense of my last illness and burial be paid as soon as can conveniently be done, as well as all my other just obligations.

2. I hereby bequeath unto Thelma Gregor Hayes, of Fairbanks, Alaska, all my property, real, personal and mixed, wheresoever situate, and of every kind and nature, of which I may die possessed, or to which I am entitled at the time of my death, to be and become her sole and separate property; provided however, the said Thelma Gregor Hayes shall pay to my sister Emma Colbert, the sum of One Thousand (\$1,000.00) Dollars; also providing that the said Thelma Gregor Hayes convey certain portions of property now possessed by me to such persons as may be designated by me prior to my passing away.

3. I hereby appoint Thelma Gregor Hayes, to be the executor of this, my last will and testament; and I further direct that the probate of my estate be carried out without the intervention of any court or courts whatsoever, except as may be required by law.

4. I hereby revoke any and all wills heretofore by me made.

In Witness Whereof, I have hereunto set my hand this 22nd day of October, 1946.

/s/ L. D. COLBERT,



In the Presence of:

/s/ JAMES F. HAYNES,

/s/ ARTHUR A. BENZ,

/s/ V. A. CABBELL. [4]

ATTESTATION OF WITNESSES

We, the undersigned, whose names are subscribed as witnesses to the foregoing instrument, do hereby certify that the said instrument, consisting of one page beside this page, was on the date hereof signed and subscribed to by Louis D. Colbert in our presence, and in the presence of each of us, and the said Louis D. Colbert then and there declared and published the said instrument to be his last will and testament, and we, at his request, and in his presence, and in the presence of each other have subscribed our names as witnesses thereto.

Dated this 22nd day of October, 1946.

/s/ JAMES F. HAYNES,

Residing at Fairbanks,  
Alaska.

/s/ ARTHUR A. BENZ,

Residing at Fairbanks,  
Alaska.

V. A. CABBELL.

[Endorsed]: Filed June 11, 1947. [5]



[Title of Probate Court and Cause.]

## AFFIDAVIT OF SUBSCRIBING WITNESS

United States of America,  
Territory of Alaska—ss.

James F. Haynes, being first duly sworn, deposes and says: That I reside in the Town of Fairbanks, Alaska, Fourth Division, Territory of Alaska; I knew the Testator, Louis D. Colbert, also known as L. D. Colbert, on the 22nd day of October, 1946, the date of the instrument now shown to me, marked as filed in this Court on the 11th day of June, 1947, purported to be the Last Will and Testament of the said deceased; I am one of the subscribing witnesses to said instrument; I also knew at the time of signing of said instrument Arthur A. Benz, and V. A. Cabbell, the other subscribing witnesses. The said instrument was signed and sealed by the said Louis D. Colbert at Fairbanks, in the Fourth Division, Territory of Alaska, on the 22nd day of October, 1946, the day it bears date, in the presence of myself and of the said Arthur A. Benz and V. A. Cabbell, and the said Testator thereupon published the said instrument as and declared to us the same to be his Last Will and Testament, and requested us in attestation thereof to sign the same as witnesses. The said Arthur A. Benz, V. A. Cabbell and I, then and there, in the presence of the said Testator and in the presence of each other subscribed as witnesses to the said instrument.

At the time of executing the said instrument,

to wit: the 22nd day of October, 1946, the said Testator was over the age of eighteen years, to wit: the age of 72 years or thereabouts, and was of sound and disposing mind and not acting under duress, menace, fraud, undue influence or misrepresentation.

/s/ JAMES F. HAYNES. [6]

Subscribed and sworn to before me this 12th day of June, 1947.

[Seal] /s/ JOHN A. LATHANAN, JR.

Notary Public in and for  
Alaska.

My commission expires 5/20/51.

[Endorsed]: Filed August 6, 1947. [7]

---

[Title of Probate Court and Cause.]

### AFFIDAVIT OF SUBSCRIBING WITNESS

United States of America,  
Territory of Alaska—ss.

V. A. Cabbell, being first duly sworn, deposes and says: That I reside in the Town of Fairbanks, Fourth Division, Territory of Alaska; I knew the Testator, Louis D. Colbert, also known as L. D. Colbert, on the 22nd day of October, 1946, the date of the instrument now shown to me, marked as filed in this Court on the 11th day of June, 1947, purported to be the Last Will and Testament of the said deceased; I am one of the subscribing witnesses

to said instrument; I also knew at the time of signing said instrument, Arthur A. Benz, and James F. Haynes, the other subscribing witnesses. The said instrument was signed and sealed by the said Louis D. Colbert of Fairbanks, in the Fourth Division, Territory of Alaska, on the 22d day of October, 1946, the day it bears date, in the presence of myself and of the said Arthur A. Benz, and James F. Haynes, and the said Testator thereupon published the said instrument as, and declared to us, the same to be his Last Will and Testament, and requested us in attestation thereof to sign the same as witnesses. The said Arthur A. Benz, James F. Haynes and I, then and there, in the presence of the said Testator and in the presence of each other subscribed as witnesses to the said instrument.

At the time of executing the said instrument, to wit: the 22d day of October, 1946, the said Testator was over the age of eighteen years, to wit: the age of 72 years or thereabouts, and was of sound and disposing mind and not acting under duress, menace, fraud, undue influence or misrepresentation.

/s/ V. A. CABELL.

Subscribed and sworn to before me this 12th day of June, 1947.

[Seal]    /s/ JOHN A. LATHANAN, JR.,  
Notary Public in and for  
Alaska.

My Commission expires 5/20/51.

[Endorsed]: Filed August 6, 1947. [8]

[Title of Probate Court and Cause.]

PETITION TO REVOKE LETTERS TESTAMENTARY AND GRANT THEM TO PERSON HAVING PRIOR RIGHT

To: Everett E. Smith, U. S. Commissioner and ex-officio Probate Judge:

The petition of Thelma G. Hayes respectfully shows:

1.

That on the 27th of May, 1947, the above entitled court appointed the First National Bank of Fairbanks, executor of the estate of Louis D. Colbert, deceased, and said bank on the 27th day of May, 1947, qualified for such trust and letters testamentary were issued to it, and it, ever since and now is, the qualified and action executor of said estate.

2.

That the said First National Bank of Fairbanks was not entitled to said appointment as a will executed by the deceased on the 22nd day of October, 1946, and subsequent to the will filed for probate by the said bank, has been filed for probate in this court by petitioner.

3.

That your petitioner is the person named in the said will executed on the 22nd day of October, 1946, as executor of the will of said decedent, and has the prior right to letters testamentary upon said estate.



Wherefore, petitioner prays that the letters testamentary issued to the First National Bank of Fairbanks be revoked, and that letters testamentary upon the estate of said Louis D. Colbert be issued to your petitioner.

/s/ THELMA D. HAYES,  
Petitioner. [9]

United States of America,  
Territory of Alaska—ss.

Thelma D. Hayes, being first duly sworn, upon her oath deposes and says: That she is the petitioner named in the foregoing petition; that she has read the foregoing petition, knows the contents thereof, and that the allegation therein contained are true.

/s/ THELMA D. HAYES.

Subscribed and sworn to before me this 31st day of July, 1947.

[Seal] /s/ WARREN A. TAYLOR,  
Notary Public for Alaska.

My commission expires 8/11/47.

[Endorsed]: Filed August 1, 1947. [10]



[Title of Probate Court and Cause.]

ANSWER OF THE FIRST NATIONAL BANK  
OF FAIRBANKS, ALASKA, TO THE PETI-  
TION TO REVOKE THEIR LETTERS  
TESTAMENTARY AND TO APPOINT  
THELMA D. HAYES AS EXECUTOR OF  
SAID ESTATE

Comes now the First National Bank of Fairbanks,  
Alaska, Executor of the Estate of said Louis D.  
Colbert, deceased, and for answer to the petition of  
Thelma D. Hayes, on file herein, admits, denies and  
alleges as follows:

I.

Admits the allegations contained in paragraph 1  
of said petition.

II.

Admits that a pretended will, claimed to be exe-  
cuted by said deceased, on the 22nd day of October,  
1946, has been filed for probate in the above en-  
titled Court by said petitioner.

III.

Admits that said petitioner is the person named  
in said pretended will, claimed to have been exe-  
cuted on the 22nd day of October, 1946, as Executor  
of said pretended will of said deceased.

IV.

Denies each and every allegation contained in said  
petition of the said Thelma D. Hayes, and each and

every part thereof, except as hereinabove specifically admitted.

And for a first further and separate and affirmative answer and defense to said petition, the said First National Bank of Fairbanks, Alaska, alleges as follows: [11]

I.

That at the time said pretended will was made, and for a long time prior thereto, and since said time, the said Louis D. Colbert was not of sound and disposing mind and memory, and he was unable to comprehend the purpose, or the nature, of the business that was then being transacted, or the purpose, or consequence, of the signing of said will, and was unable to understand, or to know, what was then being done.

II.

That on the 23d day of October, 1946, a petition was regularly and duly filed by the First National Bank of Fairbanks, Alaska, for appointment of it as a guardian of the said Louis D. Colbert, and his property, on account of him not being of sound and disposing mind and memory, and unable both on account of his mental and physical condition to take care of his business, and on the 15th day of November, 1946, the said First National Bank of Fairbanks, Alaska, was regularly and duly appointed and qualified as such guardian.

And for a second, further separate and affirmative answer and defense to said petition, the said First National Bank of Fairbanks alleges:

I.

That the affixing of the signature of the said Louis D. Colbert on said purported will, presented for probate by the said Thelma D. Hayes, was not the free and voluntary act and deed of the said Louis D. Colbert, and the said will was not signed by the claimed attesting witnesses at the request of the said Louis D. Colbert, or in his presence, or in the presence of each other.

Wherefore the said First National Bank of Fairbanks, Alaska, prays that the Letters Testamentary issued to the said First National Bank of Fairbanks, Alaska, be not revoked and that Letters Testamentary be not granted to the said Thelma D. Hayes, and that her petition be dismissed, and that said First National Bank of Fairbanks, Alaska, recover from said petitioner its costs and disbursements herein, and for such other and further relief as is just and equitable in the premises.

/s/ JULIEN A. HURLEY,

COLLINS & CLASBY,

By /s/ CHAS. J. CLASBY,

Attorneys for the First National Bank of Fairbanks, Alaska. [12]

United States of America,  
Territory of Alaska—ss.

E. H. Stroecker, being first duly sworn upon oath, deposes and says: That I am President of the First National Bank of Fairbanks, Alaska, and make this verification on behalf of said bank; that I have read the foregoing Answer, know the contents thereof, and the same is true as I verily believe.

/s/ E. H. STROECKER.

Subscribed and sworn to before me this 15th day of August, 1947.

[Seal] /s/ JULIEN A. HURLEY,

Notary Public in and for the  
Territory of Alaska.

My Commission expires June 12, 1949.

Service acknowledged.

[Endorsed]: Filed August 18, 1947. [13]

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[Title of Probate Court and Cause.]

### REPLY

Comes now Thelma D. Hayes, petitioner, and for reply to the first separate and affirmative defense, admits, denies and alleges as follows:

#### I.

Denies each and every allegation contained in

paragraph one of the first affirmative defense of the First National Bank of Fairbanks, Alaska.

II.

Denies each and every allegation contained in paragraph two of the first affirmative defense of the First National Bank of Fairbanks, Alaska.

And for reply to the second separate and affirmative defense of the First National Bank of Fairbanks, the petitioner admits, denies and alleges as follows:

I.

Denies each and every allegation contained in paragraph one of the second separate and affirmative defense of the First National Bank of Fairbanks, Alaska.

Wherefore, having replied to the answer and affirmative defense of the First National Bank of Fairbanks, petitioner prays for the relief demanded in her petition on file herein.

LATHANAN & TAYLOR,

By /s/ WARREN A. TAYLOR,

Attorneys for Petitioner. [14]

United States of America,  
Territory of Alaska—ss.

Thelma D. Hayes, being first duly sworn upon her oath, deposes and says: That I have read the



foregoing Reply, know the contents thereof, and the same are true as I verily believe.

/s/ THELMA D. HAYES.

Subscribed and sworn to before me this 26th day of September, 1947.

[Seal] /s/ WARREN A. TAYLOR,  
Notary Public in and for  
Alaska.

My Commission expires 8/11/51.

Service acknowledged.

[Endorsed]: Filed October 1, 1947. [15]

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[Title of Probate Court and Cause.]

FINDINGS OF FACT  
AND CONCLUSIONS OF LAW

This cause coming on regularly for trial before the above-entitled Court on the 16th day of June, 1950, and the Petitioner, Thelma D. Hayes, appearing in person and by and through her attorneys, Warren A. Taylor, J. L. McCarrey, Jr., and William V. Boggess, and the First National Bank of Fairbanks, Alaska, Executor of the above-entitled estate, appearing by and through its Trust Officer, Frank P. DeWree, and by its attorney, Julien A. Hurley, and the Court having heard the testimony of the witnesses called on behalf of the respective parties hereto and after considering the same and

being fully advised in the premises, does make and establish the following as the Findings of Fact herein:

### I.

That at the time said pretended will offered for probate by Petitioner, Thelma D. Hayes, was signed by the said Louis D. Colbert, Deceased, the said Louis D. Colbert was not of sound and disposing mind and memory and he was unable to comprehend the nature or purpose of the business being transacted or the purpose or consequence of signing said will, and was unable to understand or know what was then being done.

### II.

That on the 23rd day of October, 1946, a petition was regularly and duly filed by the First National Bank of Fairbanks, Alaska, for appointment of it as guardian of the said Louis D. Colbert and his property on account of him being mentally incompetent and incapable either to care for himself or of conducting his own affairs or to manage his property, and on the 15th day of November, 1946, the said First National Bank of Fairbanks, [18] Alaska, was regularly and duly appointed and qualified as such guardian.

### III.

That the affixing of the signature of the said Louis D. Colbert on said purported will presented for probate by the said Thelma D. Hayes was not the free and voluntary act and deed of the said Louis

D. Colbert because the said Louis D. Colbert was mentally incompetent to execute a will at said time.

From the foregoing Findings of Fact the Court does now enter and establish the following as Conclusions of Law herein:

I.

That the Letters Testamentary issued to the First National Bank of Fairbanks, Alaska, should not be revoked.

II.

That the said Louis D. Colbert was not of sound and disposing mind and memory at the time of the signing of said pretended will offered for probate by the said Thelma D. Hayes and was mentally incompetent to execute a will at said time.

III.

That said Petition of the said Thelma D. Hayes should be dismissed and that the said First National Bank of Fairbanks, Alaska, should be awarded its costs and disbursements herein.

Let Judgment enter accordingly.

Dated at Fairbanks, Alaska, this 27th day of June, 1950.

[Probate Seal] /s/ CLINTON B. STEWART,  
U. S. Commissioner and  
Ex-Officio Probate Judge.

[Endorsed]: Filed June 27, 1950. [19]

In the Probate Court for the Territory of Alaska,  
Fourth Division, Fairbanks Precinct

No. 1145

In the Matter of the Estate of  
LOUIS D. COLBERT, Deceased.

### JUDGMENT

This cause coming on regularly to be heard before the above-entitled Court on the 16th day of June, 1950, and the Petitioner, Thelma D. Hayes, appearing in person and by and through her attorneys, Warren A. Taylor, J. L. McCarrey, Jr., and William V. Boggess, and the First National Bank of Fairbanks, Alaska, Executor of the above-entitled estate, appearing by and through its Trust Officer, Frank P. DeWree, and by its attorney, Julien A. Hurley, and the Court having heard the testimony of the witnesses called on behalf of the respective parties hereto and having taken the same under advisement, and having entered the Findings of Fact and Conclusions of Law herein and ordered Judgment in accordance therewith;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed as follows:

#### I.

That the Letters Testamentary issued to the First National Bank of Fairbanks, Alaska, herein be not revoked.

## II.

That the said Louis D. Colbert at the time of signing said pretended will offered for probate by the said Thelma D. Hayes was not of sound and disposing mind and memory and was mentally incompetent to execute a will.

## III.

That the said Petition of the said Thelma D. Hayes is hereby dismissed. [20]

## IV.

That the said First National Bank of Fairbanks, Alaska, recover judgment against the said Thelma D. Hayes for its costs herein to be taxed by this Court in the sum of \$. . . . .

Done at Fairbanks, Alaska, this 27th day of June, 1950.

[Probate Seal] /s/ CLINTON B. STEWART,  
U. S. Commissioner and  
Ex-Officio Probate Judge.

Service admitted.

[Endorsed]: Filed June 21, 1950. [21]



[Title of Probate Court and Cause.]

## EXCEPTIONS

Comes Now, Thelma D. Hayes, Appellant, by her attorneys, Warren A. Taylor and J. L. McCarrey, Jr., and objects and excepts to the Judgment entered by the above-entitled Court on the 27th day of June, 1950, dismissing the said appellant's Petition to Revoke Letters Testamentary and Grant Them to Person Having Prior Right filed on the first day of August, 1947, whereby the said appellant as a beneficiary under a Will executed by the above named decedent, Louis D. Colbert, on the 22nd day of October, 1946, sought to revoke letters testamentary issued to the First National Bank of Fairbanks, Alaska in Probate Case No. 1141 and procure the issuance to herself of letters testamentary founded upon said Will of the 22nd day of October, 1946, upon the grounds that said will was executed subsequent to the will upon which letters testamentary were issued to the said First National Bank in Probate Case No. 1141.

That the said Thelma D. Hayes specifically objects to and excepts to the finding by the above-entitled Court that the said decedent Louis D. Colbert was mentally incompetent to execute the Will of October 22, 1946, as more fully set out in paragraph II of said Judgment and in paragraph I of the Court's Findings of Fact entered on the 27th day of June, 1950 in the above-entitled cause, to which Finding appellant excepts in its entirety;

that the said Thelma D. Hayes also specifically objects and excepts to the finding of said Court that the said will of October 22, 1946, was not the free and voluntary act of the said Louis D. Colbert by reason of mental incompetency as set out more fully in paragraph III of the said Findings of Fact, to which Finding appellant excepts in its [22] entirety.

That the said Findings of Fact and Judgment of said Court is contrary to the law and the evidence in said case.

Wherefore, the Appellant, Thelma D. Hayes, prays that said Judgment of the above-entitled Court be reversed and that the said Court be ordered to revoke the Letters Testamentary issued to the First National Bank of Fairbanks, Alaska, in Probate Case No. 1141, and be further ordered to grant Letters Testamentary to the said Thelma D. Hayes, appellant, in the above-entitled cause.

Dated at Fairbanks, Alaska, this 30th day of June, 1950.

/s/ WARREN A. TAYLOR,  
Of Attorneys for Appellant.

Service acknowledged.

[Endorsed]: Filed June 30, 1950. [23]

[Title of Probate Court and Cause.]

NOTICE OF APPEAL

To: The Honorable Clinton B. Stewart, United States Commissioner and Probate Judge of the Fairbanks Precinct, Fourth Judicial Division;

And the attorney of record for the First National Bank of Fairbanks, Executor of the Estate of Louis D. Colbert, deceased:

You, and each of you, will please take notice that Thelma D. Hayes has appealed and does hereby appeal to the Honorable District Court for the Territory of Alaska, Fourth Judicial Division, from that certain Judgment made and entered by the above-entitled Probate Court in the above entitled cause, on the 27th day of June, 1950, and from the findings of said Court as more particularly set forth in the Exceptions filed herein your appellant.

Dated at Fairbanks, Alaska, this 30th day of June, 1950.

/s/ WARREN A. TAYLOR,

Of Attorneys for Appellant.

Service and receipt of copy acknowledged.

[Endorsed]: ' Filed June 30, 1950. [24]

In the District Court for the District of Alaska  
Fourth Judicial Division

No. 6515

In the Matter of the Estate of  
LOUIS D. COLBERT,  
Deceased.

FIRST NATIONAL BANK OF  
FAIRBANKS, Executor.

ORDER

Whereas in the order entered in the above matter which was an appeal from the Probate Court for the Fairbanks Precinct, Fourth Division, number 1145 probate, which order was dated and filed herein on October 4, 1950, the title was erroneously stated as "In The Probate Court for the Fairbanks Precinct" instead of "In the District Court for the District of Alaska" and the number was "1145 Probate" instead of "number 6515" of the District Court,

Now therefore the Clerk of the Court is instructed to correct said order by lining out said erroneous parts and inserting the correct matters as herein above set forth.

Said order as amended shall be effective as of October 4, 1950.

Dated at Fairbanks, Alaska, this 1st day of November, 1950.

/s/ HARRY E. PRATT,

District Judge.

Entered in Court Journal Nov. 1, 1950.

[Endorsed]: Filed November 1, 1950. [36]

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In the District Court for the District of Alaska  
Fourth Judicial Division

No. 6515

In The Matter of

THE ESTATE OF LOUIS D. COLBERT,

Deceased.

FIRST NATIONAL BANK OF FAIRBANKS,

Executor.

### NOTICE OF APPEAL

Notice is Hereby Given That Thelma D. Hayes hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order of the above-entitled Court overruling the exceptions of the said Thelma D. Hayes to the Judgment and Findings of the Probate Court for the Territory of Alaska, Fourth Division, Fairbanks Precinct, dismissing the said Thelma D. Hayes Petition to Revoke Letters Testamentary and grant them to persons having prior right and sustaining the findings of fact, conclusions of law and judgment of said



Probate Court and entered in this action on the 4th day of October, 1950, and amended on the 1st day of November, 1950.

/s/ WARREN A. TAYLOR,  
Of Attorneys for  
Thelma D. Hayes.

Receipt of copy acknowledged.

[Endorsed]: Filed November 3, 1950. [37]

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[Title of District Court and Cause.]

#### DESIGNATION OF RECORD

To: The Clerk of the District Court for the District of Alaska, Fourth Judicial Division

You are hereby requested to prepare, certify and transmit to the Clerk of the United States Court of Appeals for the Ninth Circuit, with reference to the Notice of Appeal heretofore filed by Thelma D. Hayes in the above cause, the entire transcript of record in the above cause, prepared and transmitted as required by law and by rules of said Court.

/s/ WARREN A. TAYLOR,  
Of Attorneys for  
Thelma D. Hayes.

Service and receipt of copy acknowledged.

[Endorsed]: Filed November 6, 1950. [38]

In the District Court for the District of Alaska  
Fourth Judicial Division

No. 6515

In the Matter of  
The Estate of LOUIS D. COLBERT, Deceased.

Appearances:

MR. WARREN A. TAYLOR,  
Of Fairbanks, Alaska,  
Attorney for Appellant, Thelma D.  
Hayes.

MR. J. L. McCARREY,  
Of Anchorage, Alaska,  
Attorney for Appellant, Thelma D.  
Hayes.

MR. JULIEN A. HURLEY,  
Of Fairbanks, Alaska,  
Attorney for Appellee, First National  
Bank of Fairbanks, Alaska, Execu-  
tor of the Estate of Louis D. Colbert,  
Deceased.

September 5, 1950, 10 o'Clock A.M.

Before: Hon. Harry E. Pratt,  
District Judge.

PROCEEDINGS

The Court: This is the time set for trial in the  
matter of the Colbert Estate, 6515. Counsel ready?

Mr. Taylor: Yes, your Honor. At this time, I would like Mr. J. L. McCarrey of Anchorage, Alaska, associated as co-counsel for the plaintiff in the case.

The Court: Very well. May be entered. Proceed.

Mr. Taylor: If the Court please——

The Court: Mr. Taylor.

Mr. Taylor: Mr. Hurley, this is a case involving a will of Louis Colbert, a resident of Fairbanks, Alaska, and the plaintiff, Thelma Gregor Hayes. We expect to prove by competent testimony that on the 22nd day of October in 1946, the deceased Louis Colbert, while of sound and disposing mind and memory executed a will leaving the bulk of his property to Thelma Hayes and part of his property and cash bequest to his sister, Emma Colbert; that on the same day after contemplating the effects of the bequest to his sister, that he changed the will and on the same day another one was filed or was executed by Mr. Colbert in the presence of three witnesses. We will prove by competent testimony, your Honor, that at the time of making disposition of his property that he was of sound mind, that he knew what his property consisted of, knew who the beneficiaries of his will were and that he was in all respects competent to execute such a will and that the will executed October 22, the second will, was the last will [1\*] and testament of the said deceased and should be probated instead of a will dated quite a number of years ago in which he made a different disposition of his property.

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\* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

Mr. Hurley: May it please the Court——

The Court: Mr. Hurley.

Mr. Hurley: The evidence in this case will show that Mr. Colbert was quite ill for some time prior to the 8th day of October, 1946, and that at that time, why, on the advice of his doctor, Dr. Schaible, here in Fairbanks, he was sent to the hospital and he was ailing with what is commonly known as a hardening of the arteries. It was affecting his mind and in the hospital the evidence will show he was mentally incompetent as well as physically unwell and different people visited him there and the doctor visited him and not long after he went to the hospital the evidence will show that Thelma Hayes began under power of attorney drawing his money out of the bank and it was reported to me; and the evidence will show that I went over to see him along with Harvey Van Hook to see what his condition was personally, and after a talk with the doctor the evidence will show that we filed a petition in the Probate Court to have a guardian appointed and a hearing was held and a guardian, to wit, the First National Bank of Fairbanks, was appointed guardian and remained in that capacity until he died, at which time they filed a will for probate and the will was admitted to probate and—shortly after his death—and [2] it was not until in June I think it was that the—that Thelma Hayes filed a petition to have the probate—the will set aside and the probate set aside and to have her appointed. That went on for a year or two and was finally heard before the Judge of the Probate Court and the petition



was denied and the case is here on appeal from the decision of the Probate Judge. The evidence will show by the doctor's testimony and by the testimony of a number of witnesses that he was mentally incompetent and was actually insane at the time the will was presented by Thelma Hayes, at the time it was prepared and at the time it was signed.

The Court: Call your first witness.

Mr. Taylor: If the Court please, I believe under the laws of the Territory of Alaska, considerable latitude is allowed the court in such cases as this and to have the whole record before the Court, the record which was taken by Mr. Belida, the court reporter and reduced to writing, I would at this time move that the record of the proceedings had in the Probate Court be introduced in evidence for the court's consideration of the matters involved in this case. I don't believe—I believe that the court has the power under the laws of the Territory of Alaska and we believe that under that, the court could review this case by the record itself if such a record has been made and this has been made by the court reporter and I believe his certificate is attached to it or [3] we can have him identify it as the record made by him at the trial in the Probate Court.

The Court: Any objection, Mr. Hurley?

Mr. Hurley: Well, I think there is a lot in that record that is not admissible and wasn't objected to because at the time I didn't see any particular reason for objecting to it, although we have agreed that the testimony of Dr. Schaible can be considered



as shown by the transcript of the testimony. I don't know as there is any particular objection to it. I have some more witnesses, however, that I want to call. I don't want to be limited to the record.

Mr. McCarrey: If it please the Court, there is no reason to the limitation of this. If Mr. Hurley would like to call additional witnesses, that is perfectly reasonable to us. We would like to have, if he desires to have Dr. Schaible's testimony go in, we feel quite satisfactory that the balance go in before the Court.

Mr. Hurley: I haven't any objection to it, your Honor.

The Court: Now, let me see. They have offered all of the evidence which was submitted and reported in the Commissioner's Court.

Mr. Hurley: Yes.

The Court: Now, you have no objection to it being admitted? [4]

Mr. Hurley: Subject to the objections contained in the record.

The Court: Subject—yes, to the objections.

Mr. Hurley: My objections contained in the record.

The Court: Very well, then.

Mr. Hurley: And I would like to call additional witnesses.

Mr. Taylor: We expect to, your Honor, call additional witnesses. Possibly some of the testimony——

The Court: The testimony may be admitted then under those conditions.

Mr. Taylor: Also as to some of the witnesses, we would like to call them also for further testimony and possibly it might be repititious of some things here.

The Court: Well, that's something I don't want. I don't want you to put in the evidence in that record and go ahead and go right over the same thing. No, I wouldn't consent to that at all.

Mr. Taylor: That's satisfactory, your Honor.

Mr. Hurley: That's satisfactory.

The Court: If you—I would suggest that you better read or you will take it up in your argument the various parts of this testimony that you think is controlling.

Mr. Taylor: We could read the testimony, [5] your Honor, so as to show the questions and answers that were given at that time. We thought it was quite voluminous. It might be—it might give the Court further enlightenment if it was read and the Court would have this transcript later to refresh his memory. Whatever the Court would feel would be—bring the issues before the Court in the best way.

The Court: I can read it over and read it over carefully in chambers. It would take quite a while.

Mr. Taylor: Yes, sir.

The Court: But you can, when it come to argument, you can pick out the salient points in the testimony.

Mr. Taylor: Oh, yes, sir, your Honor. You mean prior to when we finish the case, tomorrow or today, however long it will take, we can argue the case to

the Court and the Court will consider the testimony.

The Court: Very well.

Mr. Taylor: Your Honor, is this to be marked as an exhibit or just filed?

The Court: Oh, no. Just as an exhibit.

Clerk of the Court: Appellant's exhibit "A."

(Transcript of the proceedings had in the Probate Court, dated June 16, 1950, was received and marked in evidence as Appellant's Exhibit "A.")

The Court: Do you have any witnesses to put on in your case in chief? [6]

Mr. Taylor: Yes, your Honor, we have one witness.

The Court: Very well, call——

Mr. McCarrey: Your Honor, before doing so, may I request that the court reporter affix his certification to the document? Inadvertently that was deleted.

Mr. Hurley: We can stipulate it. It was testimony taken upon the trial.

Mr. McCarrey: Very well.

The Court: Very well.

Mr. McCarrey: We call Mr. Jimmy Haynes.

### JAMES F. HAYNES

called as a witness in behalf of the appellant, being first duly sworn, testified as follows:

#### Direct Examination

By Mr. Taylor:

Q. Will you state your name please?

(Testimony of James F. Haynes.)

A. James F. Haynes.

Q. And where do you reside, Mr. Haynes?

A. Fairbanks.

Q. And how long have you resided at Fairbanks?

A. About eight years.

Q. What is your occupation, Mr. Haynes?

A. I am a trucker right now. [7]

Q. And were you formerly—did you formerly drive a cab at Fairbanks, Alaska? A. Yes.

Q. Were you so driving a cab in the fall of '46 or more particularly in October, 1946?

A. Yes.

Q. Are you acquainted with Thelma Hayes, one of the parties in this case, Thelma Gregor, also known as— A. Yes, I am.

Q. Did you know Lou Colbert during his lifetime, Mr. Haynes?

A. Only time I met him was when I went up to see him sign the will. I didn't know him.

Q. You were—You remember the date that you signed the will for Mr. Colbert?

A. No, I don't remember the exact date; just what I have heard here in the court.

Mr. Taylor: If the Court please, if Mr. Hurley would so stipulate, I would move that these exhibits be—

Mr. Hurley: Can I see the one you have?

(Mr. Taylor handed document to Mr. Hurley.)

Mr. Hurley: Is this the first or the last will?

Mr. Taylor: It is the first will.

Mr. Hurley: Where is the last one?

(Testimony of James F. Haynes.)

Mr. Taylor: If the Court please, it seems like there is one exhibit that is not here. [8]

Mr. McCarrey: May I point out, Mr. Taylor, you will find that in the probate proceedings, 1145.

The Court: Here are the files, Mr. Taylor. Perhaps it is in there.

(Mr. Taylor presented document to Mr. Hurley.)

Mr. Taylor: I would like to offer all these exhibits. I would like to offer them all at this time as they have been testified to and identified and admitted in the hearing before the Probate Court and have them marked by the Clerk in the order in which they were admitted before the Probate Court just to save time.

The Court: Can they take the same number that they had in the Probate Court and save remarking?

Mr. Taylor: I believe that would be alright, your Honor. I don't think they marked this one.

Mr. Hurley: It's marked. It was Exhibit "D" I think.

Mr. McCarrey: Well, may I point out to Mr. Taylor that that was in the probate file itself and therefore identified as Mr. Hurley says by "D." I think the whole file is "D."

Mr. Taylor: The whole probate file was introduced as an exhibit.

The Court: Very well.



(Testimony of James F. Haynes.)

Mr. Taylor: This is Petitioner's Exhibit "C" that [9] we just took out of this thing.

Mr. Hurley: "C," that's right.

Mr. Taylor: I understood that we could mark all of these exhibits, Mr. Clerk, in the order in which they were introduced in the previous trial. Is that what the Court meant?

The Court: That was what I thought would be agreeable.

Mr. Hurley: I think you will find a list there by the Commissioner with all the exhibits marked showing what they are in the file there. He made a list of them.

Mr. Taylor: The reporter made a list, your Honor, of all the exhibits and where the testimony shows in the hearing there.

The Court: Does he have an exhibit "A" there?

The Clerk of the Court: He has, your Honor. That is probate file number 1114.

The Court: Well then, Mr. Clerk, the exhibit you have already marked instead of "A," mark it "A prime." Hereafter, we will keep the markings of the Commissioner.

Clerk of the Court: Very well, sir.

The Court: And you stipulate that all of them are in evidence?

Mr. Taylor: Yes, your Honor.

Mr. Hurley: Yes, your Honor. [10]

The Court: Very well. We won't have to stop to re-mark them.

(Testimony of James F. Haynes.)

(Exhibit "A" was remarked Exhibit "A-1" and all of the exhibits introduced in evidence at the trial in the Probate Court were introduced in evidence at this time and received the same marking as at the previous trial.)

Q. (By Mr. Taylor): Mr. Haynes, I hand you a part of Exhibit "C" I believe and ask you to look at those signatures and state whose signatures appear on that? A. You mean read the names?

Q. Yeah, if you know whose signatures appeared on——

Mr. Hurley: Would you mind standing back a little bit, Mr. Taylor, so he can speak louder and so I can see him?

A. Well, my name is on there. Arthur A. Benz, V. A. Cobbell and L. D. Colbert.

Q. And did you—is that your handwriting, Mr. Haynes? A. Yes, sir.

Q. And you signed that?

A. Yes, I signed it.

Q. Would you state when and where you signed it? A. I was up to the hospital.

Q. And what was the date that you signed that, Mr. Haynes?

A. 22nd day of October, 1946. [11]

Q. And who else was present at the time, Mr. Haynes?

A. (Looking at paper) V. A. Cobbell. Gosh, I don't know. (Pause) You and Thelma; Thelma Gregor.

(Testimony of James F. Haynes.)

Q. Do you remember was Mr. Benz there that also signed it? Do you know Arthur Benz?

A. I didn't know him personally, no. All I remember was there was the names I stated and then there were three or four of us in there, just in and out more or less.

Mr. Hurley: What was that answer?

Witness: I was in——

(The answer was read by the reporter.)

Q. How did you happen to go to the hospital, Mr. Haynes?

A. Thelma asked me if I would witness this will.

Q. And when—did you see Mr. Colbert at that time? A. Yes.

Q. And who requested you to sign that paper?

A. Thelma did.

Mr. Hurley: What was that?

Witness: Thelma Gregor.

Q. But after you got to the hospital, did Mr. Colbert say anything about that particular piece of paper?

A. Yeah. He asked me if I would sign it and witness it.

Q. And what was his condition then so far as you could ascertain as to knowing what he was doing?

A. I didn't have the other opinion that he wasn't—that he [12] didn't now what he was doing.

Q. Did——

A. He seemed all right to me. I didn't know the man.

(Testimony of James F. Haynes.)

Q. Had you—now, prior to that, did you sign another will in—now was Mr. Colbert in bed at the time you went up there? A. Yes.

Q. And besides asking you to sign the will as a witness, did he carry on any further conversation?

A. Not with me.

Q. Did he talk with the other people?

A. Yes.

Q. That were in there?

A. Yes, he was talking.

Q. And do you remember what time of the day it was you went up there, Mr. Haynes?

A. As far as I remember, it was in the afternoon, late evening when I went up.

Q. And how long did you remain there?

A. About 5 minutes I imagine.

Q. Did you know Mr. Kobbell or Cobble or Cobble who was a witness at the same time?

A. No, I didn't know him.

Q. Do you know what his occupation was?

A. Off hand I don't know, no. I think he was a cab driver. I don't know. [13]

Q. Had you seen him since that time, Mr. Haynes? A. No, sir.

Q. And at the time then that you signed the will, you believe Mr. Colbert was in a state of mind that he knew what he was doing when he made that disposition of his property?

A. I would say he was.

(Mr. Taylor talked with Mr. McCarrey.)

(Testimony of James F. Haynes.)

Q. Mr. Haynes, did you see Mr. Cabble or Cobble sign the will at the time that you did?

A. Colbert?

Q. Cobbell? A. Yes.

Q. Did you see Mr. Benz sign the will——

A. Yes.

Q. (Continuing): At the same time and did you see Mr. Colbert sign the will? A. Yes.

Q. And then at his request, you three signed the will, is that right? A. Yes.

Mr. Taylor: You may take the witness.

### Cross-Examination

By Mr. Hurley:

Q. Whose pen did you sign with?

A. I don't remember whose pen I signed it with. [14]

Q. What?

A. I don't remember whose pen I signed with.

Q. Do you remember who gave you the pen?

A. No.

Q. And was Lou Colbert in bed when he signed it? A. Yes.

Q. How did he sign it?

A. How did he sign it?

Q. Yes, was he sitting up in bed?

A. More or less on an angle in bed, I guess.

Q. And what was the paper placed on when he signed it? A. Magazine or——

Q. What?



(Testimony of James F. Haynes.)

A. It was on a magazine or pad of some kind. I don't know just what it was.

Q. Where did you sign it?

A. Little table beside the bed I think.

Q. Now, how did you happen to go over there that afternoon?

A. Thelma Gregor asked if I would sign the will.

Q. Where were you when she asked you to sign the will? A. I was working.

Q. Where?

A. Independent Cab. I was driving a cab.

Q. And where did you see her?

A. She came to the stand and while I was taking her [15] home, she asked me if I would stop in and witness the will.

Q. And who was in the cab with you and Thelma Hayes? A. Nobody.

Q. What? A. Nobody, just us two.

Q. You just dropped over to the hospital?

A. Yes and I took her on home afterwards.

Q. And how long were you there?

A. Just a very short time. I don't remember how long it was. It wasn't long.

Q. Where did you first see Mr. Taylor?

A. Up in the hospital, first time I saw him.

Q. He was in the hospital and were these other gentlemen there? A. Yes.

Q. And you don't know what time of the day that was? A. It was in the evening.

Q. You mean after dinner or before?

A. As far as I remember, it was before dinner.

(Testimony of James F. Haynes.)

Q. Before dinner?

A. I am pretty sure I was working a day shift.

Q. You say you never saw Mr. Colbert before you went over there? A. Never before.

Q. You were there about five minutes? [16]

A. Five or ten minutes. I wasn't there very long, sir.

Q. Did you leave before the other people that were in there left or at the same time?

A. We all left about that time I think.

Q. Left together and who had the will, do you know, when you left there? A. I don't know.

Q. What? A. I don't know.

Q. Did you see what was done with it after it was signed? A. No.

Q. You don't know who took it or what became of it? A. No.

Mr. Hurley: That's all.

### Redirect Examination

By Mr. Taylor.

Q. Mr. Haynes, was it dusk or dark when you went over there? A. It was dark.

Mr. Taylor: That's all.

The Court: That's all then. You want to keep this witness any more, Mr. Taylor, or Mr. Hurley?

Mr. Hurley: I don't.

Mr. Taylor. Sir? We are through with this witness, your Honor. If the Court please, we have made a diligent effort to find Mr. Cobbell, made inquiries of all the [17] cab stands and the com-

panies around here and I understand that he is now in town and that he will be available possibly in a short time and if Mr. Hurley would like to go ahead with his case, I think Mr. Cobbell will be the only additional witness that we will have so far as I know at the present time.

The Court: Did he testify at the other hearing?

Mr. Taylor: No, we were unable to find him, your Honor. He was in Anchorage but we were unable to get a hold of him. We made an effort now and was just informed Mrs. Hayes driving over the highway evidently contacted him somewhere between here and Anchorage and I think he will be available for testimony as to the execution of the will. That's all the testimony that he would have and unless of course—pardon me just a moment. He is our only other witness, your Honor. If we could call him later if Mr. Hurley would like to save time and go ahead with his witnesses.

Mr. Hurley: Well, if the Court please, I have some witnesses to testify but they won't be here until after noon. I didn't know that they were going to offer the testimony. We merely stipulated that the testimony of Dr. Schiable would be entered and so I believed we had arranged for my witnesses to be here at two o'clock and it would be impossible for me to get them here before that time.

The Court: Can you get him here by 1:30, Mr. Taylor? [18]

Mr. Taylor: Sir?

The Court: Can you get Mr. Cobbell here by—

Mr. McCarrey: May I be heard on that, your

Honor? Mrs. Hayes just got in and found that Mr. Cobbell is here in town at the present time and as soon as she told me that I dispatched her immediately to go out and get him and that's where she is at the present time. She ought to be back in five or ten minutes and tell us certainly.

The Court: Very well. We will take a recess and then notify me when the witness gets here.

Mr. McCarrey: Very well, sir.

Mr. Hurley: I might say that these witnesses I have won't take more than 40—30 minutes. They're all short witnesses and that's the only additional witnesses that I have besides the ones that have testified in the former trial.

The Court: Very well, recess.

Clerk of the Court: Court is recessed.

The Court: Mr. Clerk, pursuant to stipulation of counsel by reason of the fact that they can't get their witnesses here until two o'clock, court is adjourned until two o'clock.

Clerk of the Court: Court is recessed until two o'clock.

(At 10:45 o'clock a.m., the court was recessed until two o'clock p.m.) [19]

(At 2 o'clock p.m., September 5, 1950, the court reconvened.)

The Court: I will take the file, Mr. Clerk.

Clerk of Court (Handing file to Court): Yes, sir.

Mr. McCarrey: Your Honor, it has come to my attention in reading the transcript of the court



reporter that page five and page six was inadvertently placed not in chronological order. Six came before five and at this time we also have a certificate made by Mr. Belida, the court reporter, which I would request at this time that this certificate of the transcript be put in the transcript of the record and also that page 5 and 6 be transposed so that they be in the proper order. I spoke to Mr. Hurley——

Mr. Hurley: We have no objection.

The Court: Very well.

Mr. McCarrey: While the Clerk is doing that, may I point out to the Court, we were unable to get a hold of Mr. Cobbell. We made telephone connections with Big Delta but right in the middle of the conversation, the phone operators cut it off and we were unable to get back through for about an hour. Therefore, it made it too late so we will be unable to have Mr. Cobbell come in and testify, but we have two witnesses who did witness the will.

The Court: You wish to proceed without Mr. Taylor? [20]

Mr. McCarrey: I don't have Mr. Taylor here, your Honor: I don't know why he isn't here. It's 2 o'clock.

Mr. Hurley: Have you other witnesses to go and put on?

Mr. McCarrey: No, we have not.

Mr. Hurley: No more?

Mr. McCarrey: Except in rebuttal possibly.

Mr. Hurley: We have three witnesses here we would like to call, your Honor.

The Court: I think we will proceed.



Mr. Hurley. Call Mr. Barrack.

JAMES E. BARRACK

called as a witness in behalf of the Appellee, being first duly sworn, testified as follows:

Direct Examination

By Mr. Hurley:

Q. What is your name?

A. James E. Barrack.

Q. And where do you live, Mr. Barrack?

A. Fairbanks.

Q. How long have you resided here in Fairbanks?  
A. Forty-five years.

Q. Were you acquainted with Louis D. Colbert during his lifetime? [21]  
A. Yes, sir.

Q. How long had you known him before he died?

A. (Pause): Oh, I can't recall my first acquaintance, but it is my present impression that I must have known him for 25 or 30 years.

Q. And where did you know him?

A. I knew him from my earlier years as a hardware and machinery dealer at the Sampson Hardware Company where I done considerable business with him from time to time during his mining operations from the time that I first knew him.

Q. And he was engaged here in mining, was he?

A. How's that?

Q. He was engaged in mining and prospecting?

A. Yes, sir.

Q. And were you well acquainted with him?

A. Very well.

(Testimony of James E. Barrack.)

Q. And do you remember when he became ill and went to the hospital in 1946? A. Yes, sir.

Q. And how long had he been in the hospital when you first heard about him being there?

A. Oh, possibly two or three days.

Q. You remember about what time that was?

A. It was in October, the first week I think or at the end of the first week or so in October '46. [22]

Q. And did you go over and see him after he was in the hospital in October, 1946?

A. Yes, sir.

Q. And you say the first time was two or three days after he went in the hospital?

A. Yes, sir.

Q. And then about how many times did you see him between that time and the 22nd of October?

A. I imagine—I can't exactly recall but I think that I was in there two or three times after that.

Q. I see. A. Yes, sir.

Q. And did you go to his room and visit with him? A. Yes, sir.

Q. And talk to him? A. I did.

Q. And was he in bed on those occasions?

A. Yes, sir.

Q. What was his condition there at that time when you visited him on those visits?

A. Well, I would say physically he wasn't as—he wasn't so bad, but his mind was in bad shape.

Q. What do you mean by "bad shape"?

A. Well, I mean that he was—his mind wasn't correct. His mind was wandering and it was—he

(Testimony of James E. Barrack.)

wasn't—he didn't really [23] know what he was doing or talking about.

Q. Can you remember some of the things he said that gave you that——

A. What impressed me most was the fact that his bed was up against the center of the room on the east wall of his room leaving an area and space between the bed and the south wall of his room of possibly, oh, six feet, and during the course of our conversation, why he likened that to the Tanana River or the slough out here and he was telling me about going on a trip and he says the boat is whistling right now and he says, and then he says, "We will see her very shortly coming around the bend" and he says, "She'll soon be here and then I'm going to take her." He likened that little area in there as the river or the slough and the boat was coming up this slough and that as soon as she got in, why he was going to go aboard her and sail down the river.

Q. Did he make any other remarks to you that indicated that he wasn't of sound mind?

A. Well, that was the principal one that I recall. He—after he referred to his going Outside to see his people and his—but anyhow, the thing that impressed me, made me believe that he was mentally incapacitated or goofy so to speak, why that this was a river and there was a boat coming around the bend and she had just whistled in. I knew that he was off his base at that time and I didn't recall

(Testimony of James E. Barrack.)

anything more particularly [24] because I didn't stay long.

Q. You had known him before, years before that, had you?      A. Yes, sir.

Q. And was he mentally alert and keen and——

A. Always has been, yes, sir. He was a very fine fellow but with his deteriorated mind, why it was plain to be seen that he wsn't his former self by any manner of means.

Q. Would you say that he was of sound mind when you saw him on those occasions?

A. What would I say?

Q. Would you say he was of sound mind when——      A. No.

Q. What?      A. Of unsound mind.

Mr. Hurley: That's all. You may cross-examine.

### Cross-Examination

By Mr. McCarrey:

Q. Mr. Barrack——      A. Yes, sir.

Q. (Continuing): How many beds were there in the room when you went——

A. How many guests?

Q. Beds?      A. Beds?

Q. Yes. [25]      A. Just the one.

Q. And what side of the hospital was that on, Mr. Barrack?      A. What's that?

Q. What side of the hospital was that bed on?

A. It was on that—on the south side.

Q. On the south side?      A. Yes, sir.



(Testimony of James E. Barrack.)

Q. Now, did you ever go to visit Mr. Colbert when he died?      A. Did I what?

Q. Ever go to visit Mr. Colbert when he died in the hospital?

A. At the time—before he died?

Q. Before he died, just a day or two prior to the time he died?

A. Well, I wasn't—I was there during the first two weeks, about, after he went in. He died I think about the—in the—well, I don't remember just what time he was in there. He was in there quite a while before he died, but I didn't see him. I just went to see him the first two or three times after he first went in to the hospital and I do not recall just the date of his death, but after I saw he was of unsound mind and incapable of intelligent conversation, I didn't go so often after that.

Q. Did Mr. Colbert know you when you went to the hospital?      A. Did he know me?

Q. Yes.

A. Oh, I just don't exactly recall that. I believe that he [26] did though.

Q. Well, how do you know that he was of unsound mind and that there was only 1 bed in the room and you don't recall whether he recognized you or not, Mr. Barrack?

A. I didn't ask him if he recognized me when I went in there.

Q. Did he say, "Hello, Jim" or "Hello, Mr. Barrack"?      A. Yes, sir.



(Testimony of James E. Barrack.)

Q. Then he did recognize you?

A. He recognized me, yes. It's—I didn't ask him if he did. I felt that he had. I just don't remember whether he said, "Hello, Jim" or "How are you" or—I can't say what the other man thought, but I assume that he knew me. A man that had done as much business as we did from time memorial so to speak, why, I would think—I thought that he knew me.

Q. But you do now state that he did say, "Hello, Jim," is that correct?

A. No, I don't say that. I don't.

Q. So you don't know whether or not he even recognized you?

A. I couldn't say that.

Q. Now, do you know whether or not Mr. Colbert died in '46 or '47?

A. It is my impression that he died—he was in there longer than '47. I don't remember when he died. I went to his funeral. I remember that.

Q. Do you recall whether or not he ever left the hospital [27] after he went in?

A. I believe that he did and I think he went in again, although I don't recall that either.

Q. Well, now, what time are you referring to when you state that you went over to visit him?

A. What time?

Q. Yes.

A. I am referring to the first two weeks that he was in the hospital.

Q. And what year was that?

A. '46.

Q. How do you know it was '46?

(Testimony of James E. Barrack.)

A. Well, because I recall the fact that he went in there at that particular time.

Q. How do you know he went in that particular time, Mr. Barrack? A. I am swearing to it.

Q. Yeah, but how do you know that?

A. How do I know it?

Q. Yes. What association do you have to swear to it that you know he went in the hospital in '46?

A. Well, my memory tells me that that is the time and my memory is usually reasonable good.

Q. But you don't remember when he died, although you went to his funeral, is that correct? [28]

A. Yes, sir.

Q. It may have been a year later or two years later, is that correct?

A. I think it was—he was in there longer. I am quite sure that he was in there longer. It must have been '47. I believe it was '47 that he died. I don't recall just exactly.

Q. And how long do you think he was there in the hospital, Mr. Barrack?

A. How long do I think he was?

Q. Yes.

A. I don't know how long he was in there.

Q. Now, do you recall whether or not you went in and visited him after he went back in the second time?

A. No. After he went in the second time, I—if he did go in, I don't know that he went in a second time, but it is my impression that he did.

(Testimony of James E. Barrack.)

Q. Well, you so testified. What I am trying to find out——

A. Well, I testified that it is my impression. I can't just exactly recall whether he did but I believe that he went back a second time.

Q. You didn't go to see him the second time?

A. No, I didn't go in after I found that he was in this unsound mental condition. I could see it wouldn't do me—him or myself any particular good to return, so I didn't.

Q. Mr. Barrack, did you ever see Mr. Colbert on the street [29] after you went in to visit him in the hospital that you recall?           A. No, sir.

Q. Do you know whether or not he was ever on the street after that?

A. Well, it would be hearsay if I did. I never saw him.

Q. I asked you if you know. You don't know that?           A. No.

Q. Do you know whether or not he ever resided on Graehl Island—over on Garden Island in Graehl after he got out of the hospital?

A. I heard that he did.

Q. But you made no attempt to go see him?

A. That's it.

Q. What other conversations did you have with Mr. Colbert at that time?

A. Well, we engaged in the conversation that I referred to shortly after going in and as soon as I saw that he was in that condition, why, I didn't try to——(Interrupted)

(Testimony of James E. Barrack.)

Q. Well, Mr. Barrack, I believe you testified that you went in three or four times, is that not correct?      A. Yes, sir.

Q. Did you talk that same conversation all three times?

A. Oh, no, we didn't. The other conversations that we had later were just—I often used to go over for the Pioneers and visited the boys and I would perhaps just go in and pass [30] the time of day and asked him how he was and he would say that he was fine and some words to that effect, but I never attempted to stay for any length of time because it—there was a good many pioneers to visit and—a half a dozen or so and being busy, I didn't spend any time particularly with him.

Q. Just then on this one occasion that you refer to in talking about this space?

A. That's right.

Q. And it is your testimony is it, Mr. Barrack, that there was only one bed in the room?

A. One what?

Q. One bed in the room?

A. Well, that's all I recall at this particular time because he referred to that area between the south wall and the bed as being the river and so—  
(Interrupted)

Q. Was there anybody present while you visited Mr. Colbert?      A. No, not that I recall.

Q. Just you and Mr. Colbert?

A. Might have been somebody there. I don't remember now.



(Testimony of James E. Barrack.)

Q. Now did you testify, Mr. Barrack, that Mr. Colbert mentioned his family.

A. Did I testify that he mentioned his family?

Q. Yes.

A. No, I didn't. I said he was going Outside, take the boat as soon as it got into the—as soon as it tied up he was [31] going aboard.

Q. Was he going out to see his family on the boat? A. He didn't say.

Q. Now, Mr. Barrack, do you know whether or not Mr. Colbert was delirious from his sickness or illness or was he actually insane?

A. Well, I have my own ideas about that and I couldn't tell whether he was insane or not. Not being a physician, I wouldn't know.

Q. Well you have an opinion. You talked to him.

A. Yes, I would say he was mentally incapacitated.

Q. And he was mentally incapacitated on all those occasions you were there? A. Sir?

Q. And he was mentally incapacitated on all the occasions that you were there?

A. I would say yes.

Q. Wasn't he more lucid or more intelligent in his conversation on one occasion than on the other?

A. I presume if I attempted to draw him out I might be able to so testify, but I never was there long enough to say, but it was my impression that all the times after the first conversation that he was insane and for that reason I let—I just accepted it as being such and let it go at that.



(Testimony of James E. Barrack.)

Q. And you ascertain this fact on the first visit you were [32] there? A. Yes, sir.

Q. Do you know who the beneficiaries under his first will were by any chance?

A. Did I know——

Q. Who the beneficiaries were under his first will?

A. No, only by—I never saw the will. Just hearsay.

Q. When did you know through hearsay who the beneficiaries were under his first will?

Mr. Hurley: We object to that as incompetent, irrelevant and immaterial.

Mr. McCarrey: Well, I would like to show——

Witness: I refuse to answer.

The Court: Just a minute.

Q. Well now, Mr. Barrack, in that respect you're not here to refuse or not to refuse, but here to answer the questions propounded as permitted by the Court. So I will ask you again, if you recall when you first found out who the beneficiaries were under his first will?

Mr. Hurley: We object for the reason it is incompetent, irrelevant and immaterial. He wants to know if he heard what it contained. I don't see where that has any bearing on the case.

The Court: What is the relevency of it?

Mr. McCarrey: Well, your Honor, I want to [33] establish the fact that it is my understanding—I could be in error—that the Pioneers of the Territory of Alaska were the beneficiaries under the first

(Testimony of James E. Barrack.)

will and I want to find out if he knew that or when he knew that.

Mr. Hurley: We object to that if the Court please.

The Court: Objection overruled.

Mr. Hurley: The will itself shows what it contains.

Mr. McCarrey (To witness): Answer the question please.

The Court: Answer the question.

Witness: I had understood that among the beneficiaries were the Pioneers.

Mr. McCarrey: That's all.

Mr. Hurley: That's all, Mr. Barrack. Call Mr. Young.

### FRANK YOUNG

called as a witness in behalf of the Appellee, being first duly sworn, testified as follows:

#### Direct Examination

By Mr. Hurley:

Q. What is your name?

A. Frank Young.

Q. Where do you live, Mr. Young? [34]

A. 1025—Third Avenue.

Q. In Fairbanks? A. Fairbanks.

Q. How long have you lived in Fairbanks?

A. Forty-four years.

Q. Were you acquainted with Louis D. Colbert during his lifetime? A. Yes, sir.

(Testimony of Frank Young.)

Q. How long had you known Mr. Colbert before he died?      A. Oh, 25—30 years.

Q. And were you well acquainted with him?

A. Well, yes, I was.

Q. What?

A. Yes, I was pretty well acquainted with him.

Q. Do you remember hearing about his sickness when he went to the hospital in the fall of 1946?

A. Yes, I did.

Q. What?      A. Yes, I did. I heard about it.

Q. And did you ever go over to see him after he went to the hospital in '46?

A. Yes, I was there to see him.

Q. And do you remember about what time it was that you went to see him?

A. As near as I can recall, it was about, around the middle [35] of October, something like that.

Q. And how did you happen to go over there?

A. Well, I went over there—I used to visit the sick for the Pioneers and I dropped in to see Lou because I knew him.

Q. And did you talk to him when you went in to see him?      A. Yes, I did.

Q. How many times did you go and see him in October in 1946?      A. I only went once.

Q. Just one time?      A. Yes, sir.

Q. You say that was around about the middle of October?

A. As near as I can recall about the middle of October, yes.

Q. And what—in what condition did you find him when you went to see him there at that time?

(Testimony of Frank Young.)

A. Well, I talked to him for a minute or two and his mind didn't seem right to me.

Q. Did he say anything to you that made you think there was something wrong with his mind?

A. Yeah. He asked me if the boat was ready or something to that effect and I asked him what boat. He said they were getting the boat ready, he was going someplace. I don't quite remember where he told me, but then he said several little things that I don't remember that an average person to listen to could tell that he was not mentally correct.

Q. And what impression did you get from your conversation [36] with him as to the condition of his mind.

A. Well, I just excused myself and got out of there. I could see that he wasn't, by talking to him, that he was a little off on his conversation.

Q. Would you say that he was of sound mind?

A. No, he wasn't. Not at that time I was there he wasn't.

Q. What did he say about this boat?

A. Well, he asked me if the boat was ready and I asked him what boat and well he said this boat that I'm getting ready to go on, wherever he was going, and I said I don't know anything about the boat. I told him I didn't. I didn't know what boat he was talking about.

Q. Did he say anything more?

A. Well, he said several things but I just can't remember. It has been so far back.



(Testimony of Frank Young.)

Q. Did any of it make sense to you?

A. No, it didn't make sense to me.

Q. And from that conversation you decided that there was something wrong with his mind, that he wasn't of sound mind, is that right?

A. That's right.

Mr. Hurley: That's all. You may cross-examine.

### Cross-Examination

By Mr. Taylor:

Q. What room was he in, Mr. Young? [37]

A. Well, I don't remember the number of the room but I think it was on the second floor. It might have been the third floor, right in the center of the building.

Q. Over on the north side, was it not?

A. When you come up the stairs and go down the hall, yes.

Q. And you had to turn and go towards the north side to get to his room?

A. No, the south side.

Q. Are you sure about that?

A. Yeah, I am sure.

Q. Isn't it a fact, Mr. Young, that he had a room when you come out of the stairs, up the stairs, you turn towards the west into a corridor and then turn north to go to his room?

A. Not when I seen him I didn't.

Q. Well, just what do you say?

A. Sir?

Q. Just when did you see him, the approximate date?



(Testimony of Frank Young.)

A. Well, I couldn't say the approximate date. It was sometime about the middle of October.

Q. I believe you testified that you heard that Mr. Colbert was sick, is that right? A. Yes.

Q. You didn't hear that he was insane?

A. No, sir.

Q. Now, when you went in there, what did he say? What were [38] his first words?

A. Oh, he said, "Hello, there, how are you?" Well I said, "How are you," something to that effect. He said he was feeling pretty good but when we come to talking, why the conversation he started out with I could see he was——

Q. Did he say, "Hello, Mr. Young" or "Hello, Frank"? A. Yes.

Q. He recognized you? A. Yes.

Q. And do you now how long he had been ill?

A. No, I didn't know how long he had been ill.

Q. Now, do you now whether that talk that you heard might be the result of delirium from his sickness or would it be insanity?

A. Well, that I couldn't state because I should think a doctor should know and I couldn't tell that. He didn't look like he had any fever to me or anything which might cause him to talk that way.

Q. But he was sick enough to be in the hospital, was he not?

A. He must have been. He was in there.

Q. Did you take his temperature?

A. No, sir.

Q. And now just after he said, "Hello, Frank"

(Testimony of Frank Young.)

and you said, "Well, how are you" and so forth, did he then talk about this boat? Did he immediately talk about the boat? [39]

A. Well, I don't recall if he spoke of the boat right away, but after we got talking a short time he did.

Q. What did you talk about up before the time he mentioned the boat? Did he talk clearly at that time up until the time he started mentioning the boat? A. Yes.

Q. So, up until the time he mentioned the boat, his mind was clear, he recognized you and he talked rationally until he got into this boat business, is that right?

A. That's right. He seemed to be all right until he started talking about the boat and there was something wrong about it, about the river. I can't remember now. It has been too far back, but—

Q. So he was lucid? He had lucid intervals up until the time he went talking about the boat?

A. Well, he appeared that way.

Q. Are you a member of the Pioneers, Mr. Young? A. Yes, sir.

Q. Did you know that the Pioneers were the beneficiary under Mr. Colbert's will that was drawn a number of years ago prior to going to the hospital? A. No, I did not.

Q. You say you never went back to see Mr. Colbert after that time?

A. No, I never did. [40]

(Testimony of Frank Young.)

Q. And do you know how long he remained in the hospital?

A. Well, if I can recall right, he was in there—he got out and then went back in again and was there several months and passed away. That's as near as my memory——

Q. You think he was back in there for two months after he went back?

A. Yes, I think he was all right.

Q. Couldn't it have been 2 weeks?

A. Well, I wouldn't know. I couldn't state how long he was in there but if I can—if my memory serves me right, I think he was in there and got out and back he went again.

Q. That wouldn't be the first time that you went over to see him, in fact, the only time to see him would it on the 22nd day of October?

A. No, it was about the middle, might have been the 20th.

Q. To your knowledge, to the best of your knowledge, he may have recovered from his illness, that his mind would be clear after that?

Mr. Hurley: We object to that, incompetent, irrelevant and immaterial, calling for a conclusion, nothing to base it on.

The Court: Objection sustained.

Q. But he was recovered to the point that he was released from the hospital?

Mr. Hurley: We object to that. He said he [41] didn't know anything about it. He wasn't over there, only what he heard.

The Court: Objection sustained.

Mr. Taylor: That's all.

Mr. Hurley: That's all, Mr. Young. Call Mr. Lutro.

ARTHUR LUTRO

called as a witness in behalf of the Appellee, being first duly sworn, testified as follows:

Direct Examination

By Mr. Hurley:

Q. What is your name? A. Arthur Lutro.

Q. Where do you live, Mr. Lutro?

A. 814-8th Avenue.

Q. Here in Fairbanks? A. Yes, sir.

Q. How long have you lived here in Fairbanks?

A. Present residence has only been 8 years.

Q. Did you ever live here before that?

A. Yeah, I was here for a trip in 1907.

Q. Were you acquainted with Lou Colbert during his lifetime?

A. I had known of Lou Colbert ever since 1914 when I went to the Ruby Camp. At that time he had been mining over on Trail Creek but I believe he had left the camp while I was [42] there. Talking to friends and prospecting experiences talking with others, why, I knew of him.

Q. When did you first meet him to know him personally?

A. Well, I first met Lou when I came up from Ruby in 1942.

Q. Did you get pretty well acquainted with him?



(Testimony of Arthur Lutro.)

A. Well, you know how old timers are, kind of stick together. We always talked to one another when we met. I never called on him at his home. I had quite a few conversations with him.

Q. You knew him pretty well?

A. Yes, I think I did.

Q. Do you remember when he took sick in 1946 and went to the hospital?

A. Yes, I remember that very well.

Q. And did you ever go and see him there at the hospital soon after he got sick in 1946?

A. Yes. I called on him I would say during his two sieges in the hospital that I said hello and said a few words to him forty or fifty times.

Q. And what would you say as to his mental condition there the first few times you went to see him——

Mr. Taylor: Just a moment.

Q. First I will ask about how long after he went in the hospital was it that you first went to see him?

A. Oh, I couldn't give you the exact date because I used to stop in the hospital on an average of three to four times a [43] week.

Q. Well, about how long after he first——

A. Well, it would be right away.

Mr. Taylor: Just a moment. Your Honor, I don't think there's proper foundation if he knows when he first went in the hospital. He stated——

Mr. Hurley: All right, I'll withdraw the question.



(Testimony of Arthur Lutro.)

Q. Do you remember when he first went to the hospital in 1946, the occasion of your hearing of his being in there?

Mr. McCarrey: Just a moment——

The Court: Our rules require one attorney to attempt to examine.

Mr. McCarrey: Very well sir.

Q. Do you remember the occasion of him—when he first went to the hospital in 1946?

Mr. Taylor: Just a moment, your Honor. We object to the question as leading and suggestive, answering a question by means of asking and we object to it.

The Court: Objection sustained.

Q. Do you remember when he went to the hospital in 1946?

A. I think it was in the fall of the year.

Q. Do you remember what month?

A. Yes, I would say it was in October.

Q. Do you know what part of October?

A. Well, I would say it would be the time right after the [44] Pioneer meeting because I remember very distinctly that our member of the Sick Committee reported at the Pioneer meeting which is the first Monday in October that he was ill and I don't know whether he was in the hospital or not. I couldn't state, but I knew he was in the hospital when I went there.

Q. Did you go over and see him in the hospital soon after he went there?

A. Why, sure I did.

(Testimony of Arthur Lutro.)

Q. And did you see him several times after that during the month of October, 1946?

A. Yes and I can relate that he used to always get lost around there and I would have to take him back to his room. I would find him in a different room and I would ask Lou what are you doing here. He would say, "I can't find my room."

Mr. Taylor: Just a moment Mr.—I move that the answer be stricken as not responsive to the question. The question was the times he went over there and not the circumstances of the visit.

The Court: Can you clarify that?

Mr. Hurley: How's that?

The Court: Can you clarify that matter?

Mr. Hurley: Yes.

Q. When you saw him—you saw him several times during October, did you? A. Yes. [45]

Q. And you say you saw him wandering around in the halls and other rooms? A. Yes, sir.

Q. And what excuses would he give by being in the wrong rooms?

A. Well, he wasn't all there. That was the cause of it.

Q. What do you mean "he wasn't all there"?

A. Well, his mind was wandering.

Q. Didn't know where his own room was?

A. No.

Q. You had to take him to his room?

A. Certainly.

Q. Did that happen on several occasions?

A. Yes, sir.

(Testimony of Arthur Lutro.)

Q. What was your impression from what you saw and heard him say as to his mentality?

A. I would say he was very very poor. He was—the slang word like a lot of the old timers were there losing their grip.

Q. You think he was mentally sound?

A. No, he was not.

Mr. Hurley: That's all, you may cross-examine.

### Cross-Examination

By Mr. Taylor:

Q. Mr. Lutro, did you establish it was the month of October by the fact that Mr. Hurley asked you about October that you went over there? [46]

A. No, I wouldn't say that. I used to call on all those patients there and I knew it was in the fall of the year.

Q. But I believe you stated that you believed it was in '46. You weren't sure——

A. I knew it was in '46 because I know the funeral was in '47 so I know when he got sick.

Q. When did he die, Mr. Lutro?

A. He died—we buried him the 31st of May and he died a few days before that. I don't know the exact date.

Q. Now, how long did he remain in the hospital the first time, Mr. Lutro?

A. I remember that I went over there, it was the following month of November I believe and I asked the sister, "Where's Lou"? Well, she said there was a certain party took him out of here.

(Testimony of Arthur Lutro.)

"We didn't want him to leave, but he left." That's all I know.

Q. Now when you first went over in October, 1946, to see Lou, did he know you, Mr. Lutro?

A. Sure he knew me.

Q. And he talked to you about various things, about his condition——

A. No. I maybe only talked to him two or three minutes at a time because when I went over to the hospital, I did not go over particularly to see him. I was calling on all of the old timers over [47] there.

Q. But if you went in his room, did he say "Hello Art"?

A. No, he never did say that, never did. He knew I was from Ruby. I don't think he—I've got kind of a hard name. I don't believe he ever pronounced my name.

Q. What year did you say that you were in Ruby?

A. I was in Ruby from—off and on from 1914 to 1942.

Q. And Mr. Colbert remembered you from Ruby then?

A. No. He knew of me through my relatives down there, but I don't think I ever met Lou Colbert in Ruby.

Q. He remembered you through your relatives that you had been at Ruby then, is that right?

A. Yes. Yes, sir.



(Testimony of Arthur Lutro.)

Q. And mentioned the fact in his conversation with you over here?

A. Well, you know how it is when you go over there to see somebody, why, you don't—you talk mostly about their health and we didn't talk about any of our old experiences to the best of my knowledge.

Q. Did he inquire about any of his old friends from you, Mr. Lutro?      A. No, he never did.

Q. Did you call on Mr. Colbert on the 22nd day of October, 1946?

A. I couldn't say to the exact date I was there or not on that date, no. [48]

Q. What room did Mr. Colbert occupy at the time that you were there, over there the first time you were in the hospital?

A. I know—it seems to me it was 200 and something. I know you come up the stairs and you turn to the right and go by the medicine room and it was on this wall side that faces the slough here.

Q. After he went back to the hospital the second time, did you go see him then?

A. I suppose I did because I was over there four or five times a week.

Q. And do you remember what room he had at that time?

A. Oh, I wouldn't—I know he was in some room there but I couldn't testify the exact room.

Q. Now, did that room have more than one bed in it that you remember?



(Testimony of Arthur Lutro.)

A. The room that I remember, yes, he had two beds in it.

Q. And you say you went up there and he was around in other rooms? A. Yes.

Q. Was he visiting with other patients?

A. No. He wandered from his room in his dressing gown and he didn't know where he was at.

Q. Did he by talking to the people in the other rooms—did you ever hear him have any conversations with people in other rooms? [49]

A. No, I don't think he would have any chance or he didn't know the people that were in the rooms. He would go down there to that ward way down there where there's five or six beds. I know I caught him down there once.

Q. Then I take it then from your answers that the sisters over there allowed an insane man to go wandering around in the hospital?

A. Why, you can go over there and you can see them wandering around. I don't know whether they're insane or not, in their dressing gowns.

Q. That statement hold true to Mr. Colbert?

A. Well, I wouldn't say that he was—I never testified that he was insane. He wasn't just all there I said.

Q. Mr. Lutro, do you visit sometimes sick people that are delirious or out of their head as for instance from illness?

A. No, I don't make it a practice of—

Q. However, I mean have you ever been to the hospital to see some of the pioneers or some friends

(Testimony of Arthur Lutro.)

of yours that you went in there and they would be delirious from fever or from their illness?

A. Sure I have.

Q. And have you ever went back and found that same person of clear mind when they had recovered from their bodily illness?

A. No. You could on your next visit, you might notice a little improvement, but you could still see that they were [50] still of unsound mind.

Q. You never saw one though that was in a delirium or out of their head because of illness and recover?

A. Well, I have known of cases where if they had the proper medical attention that they have, yes.

Mr. Taylor: That's all.

Mr. Hurley: That's all Mr. Lutro. That's all your Honor that we have in addition to what is already been taken in the record.

The Court: Do you have any rebuttal, Mr. Taylor?

Mr. Taylor: No, your Honor.

The Court: How much time do you gentlemen want for argument?

Mr. Hurley: I am perfectly willing to submit it without argument as far as I am concerned. The court has the testimony. It will have to be read anyway. I don't see where an argument is going to make any particular difference.

Mr. McCarrey: It is my understanding, your Honor, that you desire to have the transcript of

the record argued so that you wouldn't have to read it all. That was one of the reasons you requested that, is that correct?

The Court: Well, I was just assuming you want to make an argument. It wasn't that I wanted you to especially. Just whatever you wish.

Mr. McCarrey: Your Honor, I would like on behalf [51] of the contestant to argue briefly.

The Court: Very well. How much time do you want then?

Mr. McCarrey: I would like to have between 15 and 20 minutes if I may.

The Court: Twenty minutes?

Mr. McCarrey: Yes, your Honor, if that is not too excessive.

The Court: Is that you and Mr. Taylor together?

Mr. Taylor: Yes, sir.

The Court: Very well. We will take a recess now until three o'clock.

Mr. Hurley: It may be that I will want to reply.

The Court: Beg your pardon?

Mr. Hurley: It may be that I will want to reply briefly your Honor.

The Court: Oh, yes, yes.

(At this time, the court recessed until 3 o'clock p.m.)

(The court reconvened at three o'clock p.m.)

(Mr. McCarrey presented argument in behalf of the contestant.)

(Mr. Hurley presented argument in behalf of the appellee.)

The Court: I will take the matter under advisement.

(At 3:30 o'clock p.m., the trial of the above case was concluded and the court adjourned.)  
3:30 p.m. [52]

### Reporter's Certificate

I, Charles Belida, do hereby certify that I am the Official Court Reporter for the above-entitled court;

That upon the 5th day of September, 1950, I was the Official Court Reporter for the above-entitled court and that I attended open court proceedings on that day;

That the preceding fifty-two (52) pages constitute a full, true, complete and accurate record and transcript of all oral proceedings had in the above-entitled cause and that this record and transcript was made from my original shorthand notes taken at the trial of the above-entitled cause.

Dated at Fairbanks, Alaska, this 16th day of October, 1950.

/s/ CHARLES BELIDA,  
Official Court Reporter.

Sworn to and subscribed to before me this 16th day of October, 1950.

[Seal] /s/ JOHN B. HALL,  
Clerk of the Court. Notary Public in and for the  
Territory of Alaska.

[Endorsed]: Filed Oct. 20, 1950. [53]

APPELLANT'S EXHIBIT A-1

In the Probate Court for the District of Alaska  
Fourth Judicial Division  
Fairbanks, Alaska  
Probate Number 1145

In the Matter of  
The Estate of Louis D. Colbert, Deceased  
Attorneys

J. L. McCARREY,  
Of Anchorage, Alaska,  
Attorney for Petitioner,  
Mrs. Thelma Gregor Hayes.

WARREN A. TAYLOR,  
Of Fairbanks, Alaska,  
Attorney for Petitioner,  
Mrs. Thelma Gregor Hayes.

JULIEN A. HURLEY,  
Of Fairbanks, Alaska,  
Attorney for Defendant,  
First National Bank of Fairbanks.

Date of Hearing: June 16, 1950.

Time: 10:00 a.m.

Place: United States District Courtroom,  
Fairbanks, Alaska.

Before: Hon. Clinton B. Stewart, Ex-officio Pro-  
bate Judge, Fourth Judicial Division, Fair-  
banks, Alaska.



## Appellant's Exhibit A-1—(Continued)

## PROCEEDINGS

The Court: Are you ready to proceed?

Mr. Taylor: Ready.

Mr. Hurley: Ready.

The Court: You may proceed.

Mr. Taylor: If the Court please, I would like to have Mr. McCarrey of Anchorage and Mr. Bogges as co-counsel in this case.

The Court: Very well.

Mr. Taylor: And we would like to also ask that all witnesses be put under the rule, excluded from the courtroom until called to testify.

The Court: Very well. All the witnesses who have been called to testify in this matter this morning will absent themselves from the courtroom.

(The witnesses left the courtroom.)

Mr. Taylor: If the Court please, I will be a witness in this case and I ask that I be exempt from the rule as one of the attorneys in the case although I will not argue the case. I believe that is the rule.

Mr. Hurley: I haven't any objection and I expect to testify— (Interrupted.)

The Court: You do?

Mr. Hurley: Yes, myself same as Mr. Taylor.

Mr. Taylor: I will stipulate— (Interrupted.)

Mr. Hurley: I would like to be permitted [1\*] to present the argument.

Mr. McCarrey: Your Honor, do you care to have an opening statement on this? What is your pleasure in that respect?

\* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

## Appellant's Exhibit A-1—(Continued)

The Court: Perhaps we better have. It would be better to have an opening statement, brief opening statement at any rate due to the number of files that are actually involved.

Mr. McCarrey: Very well, your Honor. Your Honor, Mr. Hurley, I would like to make a rather succinct opening statement pertaining to the facts of this case and also the issues to be determined by your Honor. As it is no doubt well known by your Honor, Mr. Colbert lived in the Territory of Alaska for a long time prior to his demise.

Sometime during the year 1938 he made and executed a will. He was very active in mining work throughout the territory and also was a very prominent individual. During the year 1946 he became, with the passing of years, not too well in health and in October the 22nd, 1946, he made and executed a will. We will show, Your Honor, that subsequent to executing the first will on October 26, 1946, that he subsequently thereto made and executed another will at his request and that thereafter he had three witnesses put on the second will instead of two as were placed on the first one at his request; that sometime after he had executed [2] these wills, as a matter of fact, some two days, a petition was filed by the First National Bank alleging that he was incompetent to handle his own affairs and asked to be appointed as guardian ad litem of the person and property of the said L. D. Colbert.

After the customary notice of hearing and after

## Appellant's Exhibit A-1—(Continued)

one or two continuances, I believe it was on or about the 19th day of October, he was declared incompetent by the Commissioner and letters of guardianship were issued to the First National Bank with Albert Visca being the first trust officer of the bank, if my memory serves me correct. We will show that Mr. Colbert was not incompetent. He was not present at the trial. We will also show that he was able to carry on his own business. We will further show that he came home after the trial to the home of Thelma Gregor Hayes who had a cocktail bar over on Graehl Island—on Garden Island over in Graehl. We will show that for many years prior to the fall of 1946 and to the time that these two wills were executed, that Mr. Colbert was a personal friend of the Gregor family and particularly of Thelma Gregor and that he had loaned her on many occasions various sums of money and that she had been very active in assisting him in the management of his affairs. We will show that Mrs. Gregor Hayes—Thelma Gregor Hayes, more commonly known as Hayes, did expend considerable sums of money to make him comfortable and to provide [3] for him in his last sickness and that on or about the 24th day of May, 1947, after he had fallen in a water hole and became very sick with pneumonia, he died.

The facts I think aside from that are very well known before your Honor. The files are before you with reference to the proceeding of the probate of the estate, also executed letters of the guardian-

## Appellant's Exhibit A-1—(Continued)

ship. There is only one thing for you to determine and that is this: whether or not at the time that L. D. Colbert, more commonly known as Lou Colbert, executed his will on the 26th day of October, 1946; that he was of sound and disposing mind and memory and competent to execute the same. It is our belief in the case and we will attempt to prove it as such to your Honor. Thank you.

Mr. Hurley: May it please the Court, there is no question about the issue. Pleadings clearly show what the issue is. The evidence on behalf of the First National Bank will show that on the 22nd day of October and for some time prior thereto and for a long time thereafter, that the deceased, Lou Colbert, was not of sound and disposing mind and memory, not competent to handle his own affairs and was not competent to execute a valid will.

Mr. McCarrey: Your Honor, we would like to call Mr. Arthur A. Benz. Do you have a bailiff?

The Court: No, we haven't.

(Mr. Arthur A. Benz was called into the courtroom.) [4]

Mr. Hurley: What's the name?

Mr. McCarrey: Benz. B-e-n-z.

Mr. Hurley: Is the file your Honor in that other case which contains the represented will that was presented by Thelma Gregor?

The Court: Is it here?

Mr. Hurley: Yes.

The Court: Yes.



Appellant's Exhibit A-1—(Continued)

Mr. Hurley: Could I see that just a second?

(Mr. Hurley approached the bench and looked at a document.)

Mr. Hurley: What's the name, Benz?

Mr. McCarrey: Benz, Arthur A.

Mr. Hurley: I see.

The Court: Will you step forward to be sworn?  
Will you come right up here?

### ARTHUR A. BENZ

called as a witness in behalf of the petitioner, being first duly sworn, testified as follows:

Mr. McCarrey: Your Honor, may I rise to a point of information and that is this. At our request, we have asked the gentleman to make a reporting on this hearing. Now he is the official court reporter so he doesn't have to be sworn. We would like to have this record kept. [5]

Mr. Hurley: Certainly he is qualified to take it.

Mr. McCarrey: Just so that the record shows that that is understood, that's all.

Mr. Hurley: There is no necessity as far as that is concerned.

Mr. McCarrey: As long as there's no question——

Mr. Hurley: No question about his competency.

### Direct Examination

By Mr. McCarrey:

Q. Will you state your name please?



Appellant's Exhibit A-1—(Continued)

(Testimony of Arthur A. Benz.)

A. Arthur A. Benz.

Q. Will you spell your last name?

A. B-e-n-z.

Q. Where do you reside? A. 103 Wendell.

Q. Will you speak louder so that the Court can hear please? Where do you reside?

A. 103 Wendell.

Q. Fairbanks, Alaska? A. That's right.

Q. How long have you resided in Fairbanks, Alaska, Mr. Benz? A. Since July, 1946.

Q. Were you ever acquainted with a man named Louis D. Colbert?

A. Yes, I met the gentleman. [6]

Q. When did you meet him?

A. In July when I come to Fairbanks.

Q. Fairbanks, Alaska? A. That's right.

Q. How long were you acquainted with Mr. Colbert?

A. Well, I was working for Thelma Gregor. I met him through her.

Q. And whereabouts were you working at that time?

A. I went to work for Graehl Circle Bar.

Q. Now I will ask you if you know whether or not Mr. Colbert ever came over to the Graehl Circle Bar? A. He did.

Q. As a matter of fact, he lived there did he not?

A. He did after he came out of the hospital. Before that, he visited.

Appellant's Exhibit A-1—(Continued)  
(Testimony of Arthur A. Benz.)

Q. Do you know when he went to the hospital, Mr. Benz?

A. I think it was in—end of September, something like that.

Q. Of 1946?           A. That's right.

Mr. Hurley: What was that?

Witness: I think he went to the hospital end of September, somewhere around September, as much as I can remember.

Q. Did you ever have any occasion to go to the hospital [7] while Mr. Colbert was there?

A. I went there quite a few times.

Q. For what purpose?           A. To visit him.

Q. Did you ever have a conversation with him?

A. That's right.

Q. Did you ever have occasion to sign as a witness on an instrument for Mr. Colbert?

A. I did.

Q. Who requested you to sign that as a witness?

A. Nobody. I was in there visiting that night.

Q. You were in there visiting that night?

A. That's right.

Mr. McCarrey: Your Honor, I would like to rise for another point of information and that is this. Does the Court consider that all these exhibits and all these documents before this Court are in evidence?

Mr. Hurley: What documents do you—

Mr. McCarrey: In 1114, 1145 and 1141.

Appellant's Exhibit A-1—(Continued)

(Testimony of Arthur A. Benz.)

Mr. Hurley: Do you want those files all introduced?

Mr. McCarrey: I do, yes, unless the Court considers—— (Interrupted.)

Mr. Hurley: Well I don't think they can consider them introduced but I haven't any objection to the [8] files if you offer them.

Mr. McCarrey: At this time, we offer the exhibits in file 1114, 1141 and 1145 respectively as exhibits in this case.

Mr. Hurley: Now, what is 1141 so that I can get this down?

Mr. McCarrey: 1141 is the petition by the First National Bank.

Mr. Hurley: I see.

Mr. McCarrey: 1145 is the petition by Thelma Gregor Hayes and 1114 is the guardianship proceedings of the First National Bank. Your Honor, since there is no objection, may we consider those then before your Honor?

The Court: Yes.

Mr. McCarrey: May I have file 1145? It might be advisable, Your Honor, to if I may so suggest, that you take the will from that file. I don't know what the Court's pleasure is or maybe we can handle the whole file.

The Court: Take the whole file and then later on I'll decide whether it will be more convenient to take it out.

Mr. McCarrey: Very well.

Appellant's Exhibit A-1—(Continued)  
(Testimony of Arthur A. Benz.)

Q. (By Mr. McCarrey to Witness): I hand you, Mr. Benz, a document purporting to be the last will and testament of Mr. L. D. Colbert. I will ask [9] you if you have seen that instrument before?      A. I have.

Q. Does your signature appear thereon?

A. Right there on the second line down.

Q. And at whose request did you put that on?

A. On my own.

Q. Did anybody ask you to sign that?

A. Yes, they asked me if I wanted to witness on it. There was three that were there.

Q. And——

Mr. Hurley: Will you speak just a little bit louder?

A. I said that's my signature down there. I said there was three there at the same time and they asked me to put it down.

Q. And did you see Mr. Colbert sign?

A. Yes.

Q. Was there anybody holding his arm at that time?      A. No.

Q. Was anybody pointing a gun to his head?

A. No.

Q. Did he do that of his own free will?

A. He did.

Q. And I'll ask you whether or not if Mr. James F. Haynes was there at that time?

A. He was there. I was introduced to him but—



Appellant's Exhibit A-1—(Continued)

(Testimony of Arthur A. Benz.)

he was a [10] truck driver but I don't know the gentleman, but I do know Mr. Kobbell.

Q. And was Mr. V. A. Kobbell there at the time?

A. Yes.

Q. And did Mr. Kobbell sign this will in the presence of Mr. Haynes and Mr. Colbert?

A. That's right.

Q. And did Mr. Haynes and Mr. Kobbell sign in your presence?           A. That's right.

Q. And did you sign in their presence?

A. That's right.

Q. Is this your signature on the reverse side there?           A. That's my signature.

Q. Now, Mr. Benz, I believe you testified that you had been to see Mr. Colbert on several occasions?           A. That's right.

Q. And that you had a conversation with him?

A. I have—I had.

Q. Do you have an opinion as to whether or not Mr. Colbert was of a sufficient and proper mental capacity to carry on a conversation?

A. That's right, he was. I think he was one of the smartest men to talk to, that I have ever talked to in Fairbanks.

Q. What did you talk about, Mr. Benz?

A. Mining. [11]

Q. Do you know anything about mining?

A. I've been out, yes.

Q. Did Mr. Colbert talk sanely about mining?

A. That's right, he did. He told me how he



Appellant's Exhibit A-1—(Continued)  
(Testimony of Arthur A. Benz.)

made a gold strike over at Atlantic which—when he made \$2,000 a day and how he got— (Interrupted.)

Q. You do believe that he was mentally competent at that time?      A. Absolutely.

Q. Do you have an opinion as to whether or not he was mentally competent at the time he signed the will?      A. I do.

Q. Do you know why he was in the hospital?

A. He wasn't feeling good.

Q. But you feel that his mind was active and alright?      A. Absolutely.

Q. Did he know who were the people that were there that evening?      A. That's right.

Q. I will ask you, Mr. Benz, whether or not you signed another will for Mr. Colbert about that same time?      A. Just before that.

Mr. Hurley: Could I see that? Is this another will that's not in the file?

Mr. McCarrey: That's correct. Your [12] Honor, we would like to have this marked as our exhibit for identification.

(Last will and testament of Louis D. Colbert, dated 22nd day of October, 1946, was marked for identification as Petitioner's Exhibit 4.)

The Court: You offer the probate files? I mean, you offer the probate files?

Mr. McCarrey: We do, in addition to this.

Mr. Hurley: What?

Appellant's Exhibit A-1—(Continued)

(Testimony of Arthur A. Benz.)

The Court: He offered the probate files that were under discussion previous thereto and I was wondering if I should give those an exhibit—mark those as exhibits.

Mr. Hurley: Very well.

The Court: This will be marked Petitioner's Identification number four.

Mr. McCarrey: Thank you.

Q. (By Mr. McCarrey): I hand you this instrument which purports to be the last will and testament of Mr. L. D. Colbert and ask you whether or not your signature appears thereon?

A. That's my signature here.

Q. And I'll ask you if you know who asked you to sign that as a witness on that?

A. I do not remember.

Mr. Taylor: Could we interrupt just a [13] moment? What was the number or letter of that exhibit?

The Court: Identification number four. The files will be marked as follows: probate 1114 Petitioner's Exhibit "A," probate 1141 Petitioner's Exhibit "B," and probate 1145 Petitioner's Exhibit "C."

Mr. McCarrey: And this will be then "D" or "4"?

The Court: "D."

Mr. McCarrey: When it's in there.

Q. (By Mr. McCarrey): I will ask you if you know whose signature this is here?

Appellant's Exhibit A-1—(Continued)  
(Testimony of Arthur A. Benz.)

A. Mr. Colbert's.

Q. Did you see him fix that signature to this?

A. That's right.

Q. And who was present at that time?

A. I can't remember. I know on the other one, on this one here, when I signed that, there was a cab driver, Mr. Kobbell.

Mr. McCarrey: Your Honor, we have a P.A. system here we can use.

Witness: I've got a low voice today.

Mr. McCarrey: If I may hand this to the witness?

The Court: Yes.

Mr. McCarrey: Just speak into that please. [14]

Q. (By Mr. McCarrey): Do you know, Mr. Benz, where—strike that please.

Mr. McCarrey: We offer this in evidence, your Honor as Contestant's Exhibit number "D."

The Court: It will be marked Petitioner's Exhibit "D."

(Last will and testament of Mr. Louis D. Colbert, previously marked Petitioner's Exhibit 4 for identification was received in evidence and marked Petitioner's Exhibit "D.")

Mr. McCarrey: "E"?

The Court: "D."

Mr. McCarrey: "D"?

The Court: "D" as in dog.

Mr. Hurley: What's the purpose of this?

Appellant's Exhibit A-1—(Continued)

(Testimony of Arthur A. Benz.)

Mr. McCarrey: The purpose of this is to show that the testator was of testamentary capacity at that time, knew what he was doing and made a request to have the second will withdrawn for the very purpose that it wasn't exactly as he desired it.

The Court: It may be admitted as Petitioner's Exhibit "D."

Q. (By Mr. McCarrey): Mr. Benz, calling your attention to the second will, did Mr. Colbert make any remarks that it was his last will [15] and testament? A. That is something I couldn't say.

Q. Was there—

Mr. Hurley: What's that? Would you speak louder?

Witness: I cannot say that.

Q. (By Mr. McCarrey): Was there any discussion about a last will and testament at the time?

A. Yes, there was. He asked me to be a witness on that so I signed my name on that, on his last will.

Q. Who did that? A. Mr. Colbert.

Q. He asked you to himself, didn't he?

A. That's right.

Q. So he knew that it was his last will and testament? A. I presume so.

Q. Now, Mr. Benz, I will ask you if you know whether or not Mr. Colbert was pretty well taken care of for food and clothing at the Graehl Circle Bar? A. I think the very best.

Q. How do you know that?



Appellant's Exhibit A-1—(Continued)  
(Testimony of Arthur A. Benz.)

Mr. Hurley: We object. Just a minute. We object to this as incompetent, irrelevant and immaterial, no proper foundation laid and as far as the evidence is concerned, [16] he wasn't taken care of at all until long after this——

Mr. McCarrey: I object, your Honor. If Mr. Hurley wants to testify, I ask that he be sworn as a witness.

Mr. Hurley: I am not testifying. I am just saying that there is nothing in the evidence—— (Interrupted.)

Mr. McCarrey: Make your objection properly so the Court can rule.

Mr. Hurley: I am not testifying because this is not according to the evidence, what is in evidence here. That happened after that—the will was signed. According to this witness, he went over there after he had been in the hospital and after he was supposed to have signed this will. What happened afterwards doesn't have anything to do with this case.

Q. (By Mr. McCarrey): Mr. Benz, do you know whether or not Mr. Colbert resided at Circle Graehl Bar before he went to the hospital and signed this will? A. He came over at times.

Q. He came over at times?

A. That's right.

Q. As a matter of fact, you were working there?

A. That's right.



Appellant's Exhibit A-1—(Continued)

(Testimony of Arthur A. Benz.)

Q. And he came over quite frequently, didn't he?  
A. That's right. [17]

Q. And did he ever have any meals when he came over?  
A. Absolutely.

Q. Whom did he come over to see if you know?

A. Well, I think he came over to see Thelma.

Q. Anybody else?

A. Not that I could recall.

Q. Do you know whether or not Mr. Colbert came over for business reasons or personal reasons?

A. I could not answer that either.

Q. Do you know where Mr. Kobbell lives at the present time?  
A. I could not say.

Q. The witness for this will. You don't know?

A. No, I do not.

Q. Do you know where Mr. Haynes is?

A. No. I met the gentleman that night. That is the first time I met him.

Q. Did you ever meet him after that?

A. Yes, I seen him. We never talked about anything like that.

The Court: Speak right into the microphone so that the reporter can hear you.

Mr. McCarrey: That's all.

Cross-Examination

By Mr. Hurley:

Q. You came to Fairbanks in July, 1946?

A. That's right.

Appellant's Exhibit A-1—(Continued)  
(Testimony of Arthur A. Benz.)

Q. Where did you live before that? [18]

A. Anchorage.

Q. What? A. In Anchorage.

Q. How long have you lived in Alaska?

A. I've been up since 1928 when I first come here.

Q. I see. And how long had you been here before you met Lou Colbert?

A. Not quite a month even.

Q. What? A. Not even a month yet.

Q. You came here in July?

A. Yeah. I went to work for Thelma Gregor.

Q. And it wasn't a month until you met Lou?

A. That's right.

Q. Less than a month? A. Yes.

Q. Where did you meet him?

A. Over at the Graehl Circle Bar.

Q. I see. And how often did he come over there after you first met him?

A. Well, I don't know how often.

Q. Well, about how often? Once or twice a week? A. Well, in that neighborhood.

Q. I see. And that's the way you got acquainted with him? A. That's right. [19]

Q. What were you doing at the Graehl Circle Bar?

A. I was a handy man and extra bartender.

Q. You were a bartender there?

A. That's right.

Appellant's Exhibit A-1—(Continued)

(Testimony of Arthur A. Benz.)

Q. Now you say on the 22nd day of October, 1946, you saw Lou Colbert sign two wills?

A. One.

Q. You saw him sign—I thought you said you——

A. One before that.

Q. What day was that on?

A. I do not know.

Q. Well, does it show on the will what day?

A. I don't even know when the last one was signed on. I never stated that.

Q. Well, was it, was it the same day that——

(Interrupted.) A. Just before that.

Q. I say, was it the same day that he signed the last will with the 3 witnesses' names on it?

Mr. McCarrey: Just a moment. I want to object unless he shows him the instrument he is cross-examining him about. I think the rule is he's got to show him.

Mr. Hurley: Yes, I'll show it to him.

Q. (By Mr. Hurley): What time of the day was it that this first will was signed? [20]

Mr. McCarrey: Well, your Honor, which one is he referring to?

Mr. Hurley: The first will he saw Lou Colbert sign. Your exhibit "D." The exhibit "D."

Q. (By Mr. Hurley): The first will you say you saw him sign, what time of the day was it?

A. I do not remember. That's four years ago.

Q. About what time of the day was it?

A. I couldn't say.

Appellant's Exhibit A-1—(Continued)  
(Testimony of Arthur A. Benz.)

Q. You don't remember what day it was?

A. No.

Q. Well, look at the will and see if you can, from looking at it, what day it was? A. I cannot.

Q. You can't? A. No.

Q. And you don't have any idea whether it was in the forenoon or the afternoon or the evening when this first will was signed?

A. I couldn't say.

Q. And witnessed by you?

A. I couldn't say right now.

Q. What time of the day was it that the last will was signed? [21] A. In the afternoon.

Q. In the afternoon? Didn't you say in your direct examination that it was in the evening?

A. It was in the afternoon.

Q. But I say, didn't you say just a little while ago in answer to a question by the attorney on the other side that it was in the evening that you witnessed the last will and testament of Lou Colbert?

A. In visiting hours when we went in the afternoon between 7 to 9.

Q. Between 7 to 9 in the evening?

A. Yes, that's right.

Q. That's in the afternoon, is it?

A. It is to me.

Q. I see. And you don't know whether this first one that you say was the first one you saw him sign, was that that same day or was it on another day that you saw him sign?

Appellant's Exhibit A-1—(Continued)

(Testimony of Arthur A. Benz.)

A. I can't remember that.

Q. How did you happen to be over there?

A. Because I visited him.

Q. Were you visiting him on that day, the 22nd of October?           A. No.

Q. How long were you visiting him?

A. I visited him quite frequently.

Q. How many times on the day that he signed the will did [22] you visit him?

A. I do not know.

Q. You don't know? That was the last will, you don't know how many times you were there?

A. No.

Q. How long did you stay?

A. Half an hour.

Q. And who was present when the last will and testament, the one that you signed last, that you said was in the afternoon and that you also said was in the evening, who was present at that time?

A. Kobbell. I don't know him. He used to drive a cab here.

Q. Who else?

A. Mr. Haynes. I met him there.

Q. Who else?

A. And Mr. Warren Taylor.

Q. Who else?

A. That's as much as I know.

Q. Was Thelma Gregor there?

A. She might have been there, but I can't remember.



Appellant's Exhibit A-1—(Continued)  
(Testimony of Arthur A. Benz.)

Q. You don't remember. Did you see a nurse there? A. Yes, I seen a nurse there.

Q. That same time? A. That's right.

Q. And who asked you to sign the will? [23]

A. They asked if I would witness it.

Q. Who.

A. Warren Taylor here. He asked me if I would be a witness.

Q. And you say there were nurses around there?

A. As far as I know, they were in there and out all the time.

Q. Did you hear any of them asked to witness the will? A. No.

Q. And you say that—when was it you became especially friendly with Mr. Colbert?

A. Right after I met him because he was interesting to talk to. He is well educated.

Q. What? A. He was well educated.

Q. How often did you go over to see him at the hospital? A. Two or three times a week.

Q. And how long had he been there before he signed this last will, you say?

A. I would say 20 days anyway.

Mr. Hurley: I see. I think that's all.

Mr. McCarrey: No re-direct, your Honor. Mr. Hurley, will you have any occasion to call the gentleman back?

Mr. Hurley: I don't think so.

Mr. McCarrey: All right if he stays here in court then? [24]

Appellant's Exhibit A-1—(Continued)

Mr. Hurley: Why, not if he's going to be a witness again for any purpose.

Mr. McCarrey: I don't think so.

Mr. Hurley: Well, if he isn't, it is all right. If you don't recall him.

Mr. McCarrey: I don't need him any more.

Mr. Taylor: You work, Mr. Benz?

Mr. Benz: No.

Mr. McCarrey: You can stay here if you want to or do whatever you want to.

I call Mr. Warren Taylor.

WARREN A. TAYLOR

called as a witness in behalf of the petitioner, being first duly sworn, testified as follows:

Direct Examination

By Mr. McCarrey:

Q. Your name is Warren A. Taylor?

A. Yes, sir.

Q. And you're a practicing attorney, admitted to the bar here in Fairbanks, Alaska?

A. Yes, sir.

Q. Were you ever acquainted with Thelma—L. D. Colbert, more commonly known as Lou Colbert?

A. Yes, I was. [25]

Q. When did you first meet Mr. Colbert, Mr. Taylor? A. In early—in the fall of 1944.

Q. Were you very well acquainted with Mr. Colbert?

A. I was quite well acquainted with Mr. Colbert.

Appellant's Exhibit A-1—(Continued)  
(Testimony of Warren A. Taylor.)

Q. Did you have occasion to see him frequently?

A. Yes, I did. I know before he went to the hospital for a long time I used to talk to him on the street and occasionally he would drop in the office.

Q. As a matter of fact, you did legal work from time to time?

A. Yes, I did do some legal work for him.

Q. Now, will you please tell the court what kind of man Mr. Colbert was?

A. Well, Mr. Colbert impressed me as a man who had a very good background educationally. He talked intelligently and from his conversation I assumed that he had at one time had been a man of some substance and good background.

Q. Do you know what his business was?

A. He had been engaged in mining for quite a number of years in Alaska and then he had I think some rental property here in Fairbanks which he derived an income from.

Q. What kind of mining was he engaged in?

A. Placer mining I believe.

Q. Was he very active in social affairs?

A. Well, not so much in social affairs. He had been quite [26] active politically.

Q. Do you recall what party he belonged to?

A. Republican Party.

Q. As a matter of fact, he ran several times, did he not?

Appellant's Exhibit A-1—(Continued)

(Testimony of Warren A. Taylor.)

A. He had been a candidate and I used to talk politics with him often.

Q. I'll ask you if you know whether or not Mr. Colbert was pretty well known in and around Fairbanks and the Fourth Judicial District?

A. Yes, he was very well known.

Q. Now I will ask you if you had occasion on or about the 22nd day of October, 1946, to prepare a last will and testament for Mr. Colbert?

A. Yeah, I did.

Q. Will you tell the court the circumstances surrounding that?

A. During the—I believe it's on the 21st—Mr. Colbert sent word or I believe it was by telephone from the hospital to one of the nurses that Mr. Colbert wanted to see me and I went over in the afternoon and he told me that he wanted to draw up a will and I asked him about the property, who his heirs were or who he wanted to name as beneficiaries under the will and he gave me the necessary information. I went back to the office. It was fairly late in the afternoon when I got the will prepared and that evening, it was fairly late, [27] I went to the hospital and he executed the will at that time in the presence of Mr. Benz and Mr. Kobbell—Kubbell I believe you pronounce it.

Q. Now, was Mr. Kobbell and Mr. Benz present at the time he signed his will?

A. Yes, they were.

Q. Were you also present, Mr. Taylor?



Appellant's Exhibit A-1—(Continued)  
(Testimony of Warren A. Taylor.)

A. Yes, sir.

Q. What was the state of Mr. Colbert's mind at that time with reference to his property?

Q. Well, it was very clear. He talked intelligently. We visited on a number of subjects. He said he wanted to dispose of his property because he had been quite ill and I discussed it with him and he was very lucid, very clear in his mind about what he wanted to do with it.

Q. What did he know about the bounty or the fruits of his property he asked to dispose of?

A. I didn't quite get the question.

Q. Well, did he know anything about the bounty or the fruits of his property as to make disposition thereof in a last will and testament?

A. Well, he told me what property he possessed and he said he owns a number of mining claims, but he didn't—he said there were quite a few of them. He had a list of them but he didn't have them there so I didn't include anything that [28] he had under the provisions of the will that he was going to make.

Q. Did you have a discussion with him with reference to the beneficiaries who were to receive his property under his will?

A. Yes, sir I did.

Q. Did he talk about them?

A. Oh, yes; he did.

Q. What did he say?

A. He told me he had a sister living in the east,



Appellant's Exhibit A-1—(Continued)

(Testimony of Warren A. Taylor.)

Emma Colbert. I think she was a spinster. I don't think she had ever been married and he wanted her to have \$25.00 a month for the rest of her life. The balance of the property was to go to Thelma Gregor Hayes as she had been very good to him during the years that she had known him.

Q. Now, did he tell you that?

A. That's what he told me.

Q. Did you ever have any discussion with him about a brother of his?

A. No, I don't remember any discussion about a brother. He mentioned a sister. I believe he had two sisters. One of them is dead.

Q. Do you know whether or not the brother had died?

A. No. I had no information regarding that.

Q. Do you feel that Mr. Colbert knew what he was doing at the time he was requesting you to make a will? [29]

A. Very extremely clear in his mind. He talked on a number of subjects, especially that, and I feel that he was just as competent as any average person would be to make a will at that time.

Q. Now, you heard Mr. Benz testify that there was another will? A. Yes, sir.

Q. I wonder if you would mind telling the court the circumstances surrounding the execution of that?

Mr. Hurley: Which one are you referring to now?

Appellant's Exhibit A-1—(Continued)  
(Testimony of Warren A. Taylor.)

Mr. McCarrey: The second will on that same day.

A. The first will I believe was, Mr. McCarrey, is the one marked Exhibit "D." That's the one when we went over there it was late at night. I think it was pretty close to midnight when we went there. And then the next day or the next morning, Mr. Colbert had one of the nurses phone for me to come back and said that he had been thinking over the disposition of the request to his sister and he thought that it would be better if she was paid a lump sum rather than pay it at the rate of \$25.00 a month. You derive more good out of it by getting a lump sum and incidentally, he told me that she was in fair circumstances and didn't really need the money but he was going to give her the thousand dollars anyway. [30] And so then he also said that he wanted some of this property, he might want to sell some of it, various parcels of property, before he died and he asked me if I would put in the will a proviso that he would sell, he could sell anytime prior to his death. I didn't think it was necessary to put it in but he wanted it in there so I included it in the new will.

Q. Mr. Taylor, did you go over to talk to Mr. Colbert after the nurse called you about the second will?

A. Yes, that's what I did. I went over and had a talk with him and that's when he explained how he wanted the bequest to his sister changed.

Appellant's Exhibit A-1—(Continued)

(Testimony of Warren A. Taylor.)

Q. And what was the condition of his mind at that time?

A. Very clear. He had given it quite a bit of thought and talked lucidly as you are now at the present time.

Q. You feel then that he was very well aware of his request to you and the ultimate results of that bequest?      A. Oh, yes; absolutely.

Q. Did you prepare a second will, Mr. Taylor?

A. I did.

Mr. McCarrey: May I have Exhibit "D" please?

Mr. Boggess: That wouldn't be Exhibit "D." That would be Exhibit "C."

Q. (By Mr. McCarrey): I hand you Exhibit "D" and ask you whether or not that's [31] the first will you prepared?

A. Yeah, that's the first will.

Q. And you state that that was taken to Mr. Colbert rather late at night?

A. Yes, that was made late at night. We dated it the 22nd because it was so close to around midnight that we—anyway, it didn't make a great deal of difference.

Q. Do you recall who was present at that time?

A. Mr. Benz and Mr. Kobbell and myself and Mr. Colbert and I think off and on possibly once or twice there was a nurse came in.

Q. There is some interlineations on that will. I

Appellant's Exhibit A-1—(Continued)  
(Testimony of Warren A. Taylor.)

would like to ask you when they were placed there and who placed them?

A. That was placed on there the next day and I understand later that that was written by a nurse or somebody else and initialed by Mr. Colbert when the will—— (Interrupted.)

Q. That was the first will—— (Interrupted.)

A. That's the first will, yeah.

Mr. McCarrey: May I see Exhibit "C"?

Q. (By Mr. McCarrey): And now I hand you the file of Petitioner's Exhibit "C" and therein you—what purports to be the last will and testament of Mr. Louis D. Colbert and I will ask you who prepared that will if you know?

A. I did. I dictated that subsequently. [32]

Q. And at whose request?

A. At the request of Mr. Colbert.

Q. And was that will prepared pursuant to the direction of the testator, Mr. Colbert?

A. Yeah, but—pursuant to the directions given to me early in the afternoon of October 22nd.

Q. I will ask you if you know when that was signed?

A. That was on the afternoon of October 22, 1946.

Q. And who was present at the time of the signing?

A. Mr. Benz who just testified, Mr. Kobbell, Mr. Haynes and I believe at that time, Thelma Hayes was there.



Appellant's Exhibit A-1—(Continued)

(Testimony of Warren A. Taylor.)

Mr. Hurley: What?

Witness: I believe Thelma Hayes was there.

Q. (By Mr. McCarrey): Now, I will ask you if you know whether or not Mr. Colbert signed that will as his own free act and deed? A. He did.

Q. In whose presence did he sign that?

A. He signed it in the presence of James F. Haynes, Arthur Benz, V. A. Kobbell, myself, and if Mrs. Hayes was there, in her presence also.

Q. And I will ask you if you know when the subscribed witnesses affixed their signatures thereto?

A. Immediately after Mr. Colbert had signed.

Q. At whose request? [33]

A. At Mr. Colbert's request.

Q. Was there any discussion pertaining to the will?

A. Well, Mr. Colbert looked—read it over and said that was the way he wanted it and made some remark he thought that would be the last.

Q. Could you tell the court the difference between this will and this other will?

A. Well, the first will——

Mr. Hurley: We object. The wills show for themselves.

Mr. McCarrey: Very well.

Q. (By Mr. McCarrey): Did you ever have occasion to see Mr. Colbert after that?

A. Yes, I did.

Q. When and where, do you recall?

A. At the—well, I visited him at the hospital



Appellant's Exhibit A-1—(Continued)  
(Testimony of Warren A. Taylor.)

several times after that and quite a number of times at the Graehl Circle Bar.

Q. Did you have occasion to talk to him when you visited him?

A. Practically every time that I went out there.

Q. Do you have an opinion as to his competency at the time he made the will and for some time thereafter?

A. Oh, yeah. He was—his mind was very good at the time he discussed the will and signed them both and Mrs. Hayes [34] was running the Graehl Circle Bar and I used to go out there quite often for dinner. They serve very fine dinners there and sometimes I would talk with Lou down in the dining room and other times I'd went upstairs and seen if he was—how he was.

Q. Did you notice anything peculiar or different about Mr. Colbert when you visited him at the Circle Graehl Bar?

A. No. He was the same as the average person. He was weak for a while. He was physically weak from his—the sickness.

Q. But his mind—

A. Mentally he was very alert.

Mr. McCarrey: Your honor, we have been in session about an hour. May we have a 10 minute recess?

Mr. Hurley: Just a minute. About how many more witnesses do you have? I have a witness I have to—the reason I ask—

Appellant's Exhibit A-1—(Continued)

(Testimony of Warren A. Taylor.)

Mr. McCarrey: I would guess we have about 6 or 7 more. I don't think we will get finished this morning.

Mr. Hurley: Then I have no objection to the recess.

The Court: Recess for 10 minutes.

(Whereupon, a recess of 10 minutes was had.)

(Mr. Warren A. Taylor returned to the stand under direct examination by Mr. [35] McCarrey.)

Q. Mr. Taylor—

Mr. Taylor: Pardon me. I'll get the old cheaters here. (Mr. Taylor left the stand and returned with his glasses.)

Q. Now, I will ask you if you know whether or not Mr. Colbert was taken care of over at the Graehl Bar after he left the hospital? A. Yes, I do.

Q. How was he taken care of if you know?

A. Well, he was given a room and he was fed by Thelma for a number of months there.

Q. How do you know that?

A. I think he was very well taken care of. Oh, I've been over there and eaten down there in the dining room and I have been upstairs where he was stopping in the apartment upstairs.

Q. Now calling your attention to the last will and testament which you have before you, I will

Appellant's Exhibit A-1—(Continued)  
(Testimony of Warren A. Taylor.)

ask you if you know where Mr. James F. Haynes is at the present time?

A. Mr. Haynes is I think he is in Valdez at the present time and will not be back until the 26th. I made inquiries to have him here but he was on a trip until that time.

Q. Do you know where Mr. V. A. Kobbell is?

A. I made inquiry to have him present here today. I believe he has left the country. He is not around. [36]

Q. He's not in Fairbanks?

A. Not in Fairbanks.

Q. Mr. Taylor, did you have any occasion to visit Mr. Colbert at the Circle Graehl Bar with an old friend of Mr. Colbert's? A. Yes, I did.

Q. Will you please tell the court the approximate time and the circumstances surrounding that?

A. It was after he had got out of the hospital and Mr. Allman who was from the time he was a small boy was raised in Fairbanks and was an old friend of Lou's. I think they did mining in the same area. Well, Mr. Allman went over with me one night to see Lou. I might say in that respect that Mr. Allman had left here in 1917 to go into the Army and served several years, couple of years overseas and then he was in the newspaper business over there and did not come back to Fairbanks until around 1946.

A. And was there anything that happened at that time that recalls to your recollection?

Appellant's Exhibit A-1—(Continued)

(Testimony of Warren A. Taylor.)

A. Well Jack and I were going to have dinner. I think my wife and Miss Lee went along and Jack expressed a desire to see Lou and went up. Lou recognized him. They had a great talk about the old days here although at the time it was quite remarkable of his memory of faces, a period of 1917 to 1946 and they talked about the old times on the trail and [37] mutual friends that they have had for many years and Jack went back afterwards to see him but not in my presence.

Q. I will ask you if you know how long it had been since Mr. Colbert had seen Jack Allman?

A. It had been since the summer of 1917 until the fall of 1946, in the winter of 1946.

Q. And did you have to introduce Mr. Allman to Mr. Colbert?

A. I did not. Mr. Colbert recognized him.

Mr. McCarrey: I would like to have this marked for identification.

The Court: Petitioner's identification number five.

(Power of attorney signed by Mr. L. D. Colbert was received and marked Petitioner's Exhibit 5 for identification.)

Q. (By Mr. McCarrey): I hand you this instrument and ask if you know what that is?

A. Yes, I do.

Q. What is it?



Appellant's Exhibit A-1—(Continued)  
(Testimony of Warren A. Taylor.)

A. That is a power of attorney executed by Mr. Colbert.

Q. At whose request was that drawn up?

A. By Mr.—at Mr. Colbert's request.

Q. And who prepared the instrument?

A. I did. [38]

Q. Did Mr. Colbert sign that in your presence?

A. He did.

Mr. McCarrey: We offer it in evidence.

Mr. Hurley: Could I see it please?

(Mr. McCarrey showed the document to Mr. Hurley.)

Mr. McCarrey: I would like to offer it in evidence, your Honor.

The Court: Marked as Petitioner's Exhibit "E."

(The power of attorney previously received and marked Petitioner's Exhibit 5 for identification was received in evidence and marked Petitioner's Exhibit "E.")

Q. (By Mr. McCarrey): I will ask you if you know, Mr. Taylor, what purpose that was prepared for?

A. To empower Thelma Gregor Hayes to look after his property during his illness.

Q. Where was Mr. Colbert at that time?

A. I believe he was in the hospital at the time.

Q. Was Mr. Colbert able to get out and around at that time?



Appellant's Exhibit A-1—(Continued)

(Testimony of Warren A. Taylor.)

A. No, he wasn't able to get out.

Mr. McCarrey: May I approach the witness, your Honor?

The Court: Yes.

Mr. Hurley: You say there was a nurse that phoned you on the 22nd of October, Mr. [39] Taylor?

Mr. McCarrey: Just a moment. I want to approach the witness and the court has granted me permission. Just a moment please.

(Mr. McCarrey approached the witness.)

Q. (By Mr. McCarrey): Was there any other reason why Mr. Colbert wanted to have this power of attorney given to Mrs. Gregor?

A. Well——(Interrupted)

Q. Or Hayes, Mrs. Hayes?

A. At the time that he asked me to draw up this power of attorney, he said that Thelma had helped him with his affairs for quite a few years and he wanted her to have the authority to handle his affairs while he was ill.

Mr. McCarrey: That's all. Just a moment, please—that's all.

Cross-Examination

By Mr. Hurley:

Q. You say it was a nurse who called you on the 22nd day of October because Mr. Colbert wanted to see you?

Appellant's Exhibit A-1—(Continued)  
(Testimony of Warren A. Taylor.)

A. I don't say it was a nurse. It was some female voice that had called from the hospital.

Q. You don't know who it was?

A. And said Mr. Colbert would like to have me come over. No, I don't know. I didn't inquire.

Q. You never found out who called you? [40]

A. No, I didn't know.

Q. And you say along about midnight that Mr. Benz and Mr. Kobbell also were there at the hospital?

A. Yes, it was late in the evening.

Q. How did they happen to be there, do you know?

A. Mr. Kobbell had to go—I think I went over in the cab with Mr. Kobbell and I think arrangements were made for Mr. Haynes to go along as a witness to this will.

Q. Who made the arrangement for him to go?

A. I believe Mrs. Hayes did. I think she knew about this will.

Q. Was there any nurses on duty there at that time?

A. I think there was. Nurse came in once while we were there.

Q. There were nurses there on duty at that time?

A. Yes.

Q. And on the afternoon, you say the last will was executed in the afternoon?

A. Yeah.

Q. About what time of the day was that?

Appellant's Exhibit A-1—(Continued)

(Testimony of Warren A. Taylor.)

A. Oh, it would be pretty hard to remember, Mr. Hurley. It was long after the middle of the afternoon. I am unable to set the time. Close to five o'clock.

Q. Was it before or after dinner?

A. What? [41]

Q. It was before they had their dinner over there? A. Yeah.

Q. And there were nurses on duty there at that time, were there?

A. I presume they were.

Q. And how did these 3 men, Mr. Haynes and Mr. Benz and Mr. Kobbell, how did they happen to be there at that time?

A. I think they requested——

Q. What?

A. I believe they were requested to go over there.

Q. By who? A. I don't know.

Mr. Hurley: That's all.

Mr. McCarrey: That's all.

(The witness left the stand.)

Mr. McCarrey: I will call Mr. Muldoon.

The Court: Step forward and be sworn.

## Appellant's Exhibit A-1—(Continued)

## ALBERT C. MULDOON

408-6th Avenue, Fairbanks, Alaska, called as a witness in behalf of the Petitioner, being first duly sworn, testified as follows:

## Direct Examination

By Mr. McCarrey:

Q. Will you state your name please?

A. Muldoon, Albert C. [42]

Q. Where do you reside, Mr. Muldoon?

A. 408-6th Street.

Q. Fairbanks, Alaska? A. That's right.

Q. How long have you resided in the Territory of Alaska? A. Twelve years.

Q. Did you ever know a gentleman by the name of Mr. Louis D. Colbert, more commonly known as Lou Colbert? A. Yeah.

Q. When did you first meet Mr. Colbert?

A. I met him in 1946, along in July or August.

Q. Whereabouts did you meet him?

A. I was building a couple of houses out at 13th and Gillam. He used to walk by there every day or so.

Q. Will you tell the court the circumstances around which you had the opportunity to meet Mr. Colbert?

A. Well, he used to stop and ask me about the property and how much it was worth and how much I was spending.

Appellant's Exhibit A-1—(Continued)

(Testimony of Albert C. Muldoon.)

Q. You say he came by frequently?

A. Yes, he came by there several times in the course of a month or two.

Q. When was the last time, do you recall, ever having a conversation with Mr. Colbert?

A. The last time I saw him was in the winter of 1947.

Q. And whereabouts did you see him? [43]

A. In the Post Office here.

Q. Was anybody else present at that time?

A. Well, there was lots of people there, but nobody while I was talking to him. Nobody came up that I remember.

Q. So, you had occasion during the summer of 1946, fall of 1946 and early winter of 1947 to talk to Mr. Colbert on several occasions, is that correct?

A. That's right.

Q. Do you have an opinion as to his mental competency?

A. Well, I thought the man was pretty clever.

Q. Why? What makes you say that, Mr. Muldoon?

A. Well, he told me that he had an interest in Graehl and talked about trading his interest in Graehl for one of the houses I was building at 13th and Gillam.

Q. Did he say why he wanted to trade his interest out at Graehl?

A. No. He asked how I would like to have an interest in a night club. He didn't say why.



Appellant's Exhibit A-1—(Continued)  
(Testimony of Albert C. Muldoon.)

Q. Did that ever materialize? Did you ever make the trade?

A. No, I couldn't do business with him.

Q. Now, you are a businessman, are you not?

A. That's right.

Q. And you have occasion in the course of your business to talk to lots of people, haven't you?

A. What? Yes. [44]

Q. Would you say that Mr. Colbert, during the summer, fall and early winter of 1946 was a man of ordinary business prudence?

A. I would say he was mighty clever; the deal he tried to make with me.

Q. You felt then that he was business wise?

A. That's right.

Q. And did he display any indication of being mentally unbalanced?

A. Oh, no. Of course, I don't know much about insanity, but I think the man was very very smart and very clever for the deal he tried to put over.

Mr. McCarrey: That's all.

### Cross-Examination

By Mr. Hurley:

Q. When was it, Mr. Muldoon, that you talked to him, in 1946?

A. When I was building those houses. I looked the date—I had the date registered on June the 26th after I bought the place from Cotton and then

Appellant's Exhibit A-1—(Continued)

(Testimony of Albert C. Muldoon.)

in about a week I started building that house, rebuilding it and building the other one alongside of it and then I imagine it was about 3 months, Lou used to stop there in the afternoon and talk.

Q. That was when he was living in his house?

A. I don't know, Mr. Hurley, where he was living, but I know [45] he used to come by.

Q. He used to pass there?

A. He used to pass there.

Q. Going to town and coming back?

A. Yes, always walking.

Q. And he was able to get around all right at that time, was he?

A. Oh, yes; he walked there and walked away.

Q. Was it then that you talked to him about the nightclub or afterwards?

A. Well, the date when I was building there.

Q. That's when you talked to him and he told you that he had an interest in the Graehl Circle Bar?

A. That's right.

Q. Did he tell you what that interest was?

A. No, he didn't. That's where I thought he was so clever. He wouldn't tell me until I agreed to make the trade with him.

Q. And what was the nature of the trade he wanted to make?

A. Well, he said he had an interest in Graehl, that it was a substantial sum and he asked me what I was spending out there.

Appellant's Exhibit A-1—(Continued)  
(Testimony of Albert C. Muldoon.)

Q. Yes.

A. And I told him that I figured that it would cost \$25,000 and he told me that—he never told me the amount but he [46] told me it was a substantial amount.

Q. What kind of a trade did he offer to make that you thought was so—that he was quite capable?

A. Well, he wanted one of the houses. He wanted the big house.

Q. For the Graehl Circle Bar?

A. For his interest in the Graehl Circle Bar.

Q. But you never found out whether he had an interest or not?      A. No, I didn't.

Q. No, you didn't?

A. Only what he told me.

Q. And you didn't inquire further to find out what kind of a trade you could make with him?

A. Well, that's when I looked him up. I think it was winter time and I used to come looking for him and I met him in the Post Office here. I got that Smith, who used to be Commissioner in the house in there and I wasn't getting enough money from the houses to pay the taxes on the property so I wanted to get rid of the house. That's when I looked him up and I met him here. I used to go on the street looking for him.

Q. What time in 1947 that you saw him at the Post Office?

A. What time of the day?

Appellant's Exhibit A-1—(Continued)

(Testimony of Albert C. Muldoon.)

Q. What time in 1947? [47]

A. It was in the early winter time.

Q. In 1947? A. In 1947, yes.

Q. Had you known about his sickness and his being in the hospital?

A. No, I didn't know about that.

Q. You didn't know about that?

A. Nothing.

Q. And what was the conversation you had with him in the Post Office?

A. Well, I asked if he was still ready to trade. He said yes, he would trade and then I asked him what interest he had over there. "Oh," he said, "I have got quite an interest," and then I couldn't do anything with him and sent Skinner after him. That was my partner and Skinner met him the next day.

Q. Well, were you with him?

A. No, I wasn't with him.

Mr. Hurley: Well, I don't care to hear about that. That's all.

Redirect Examination

By Mr. McCarrey:

Q. One more question please, Mr. Muldoon. I believe you testified under cross-examination that you looked up the date and found out it was some time in June when you bought the [48] property?

A. No, you misunderstood me. When I bought



Appellant's Exhibit A-1—(Continued)  
(Testimony of Albert C. Muldoon.)

that property out there from a man named Cotton, I bought it through Betty Janes and she had the date recorded for me on the 26th of June and then after that I started rebuilding the house out there.

Q. That's what I understood it to be.

A. It took about 3 months. Lou used to walk by every day.

Q. That would be June—that would be on the 23rd of June?

A. I think it was the 26th. I'm not sure.

Q. 26th of June? So you didn't start building until sometime after the 4th of July?

A. That's right. I think we started right after the 4th.

Q. And you say you were building there for about 3 months?      A. That's right.

Q. That would be all of July, August and all of September?      A. Approximately.

Q. And it was during this course of time that you talked to Mr. Colbert on frequent occasions?

A. That's right, that's right. I used to be out there every day when doing the work and old fellows would stop by there.

Q. And during this period of time, he appeared to have a lot of business acumen?

A. He appeared to be very clever.

Q. Mr. Muldoon, did you notice any change between the time [49] you first met Mr. Colbert in June, July and August and then again when you saw him in the early winter of 1947?      A. No.



Appellant's Exhibit A-1—(Continued)

Mr. McCarrey: That's all.

(The witness left the stand.)

Mr. McCarrey: I would like to call Mr. John Cetkovich.

Mr. Hurley: How do you spell that name?

Mr. McCarrey: C-e-t-k-o-v-i-c-h.

MR. JOHN CETKOVICH

called at a witness in behalf of the Petitioner, being first duly sworn, testified as follows:

Direct Examination

By Mr. McCarrey:

Q. Your name is John Cetkovich, spelled C-e-t-k-o-v-i-c-h? A. Yes, sir.

Q. And where do you reside, Mr. Cetkovich?

A. I stay over to the High Spot Cafe.

Q. And how long have you resided in the Territory of Alaska? A. Oh, about 25 years.

Q. You're a cook by trade, aren't you?

A. Yes, sir.

Q. Now, Mr. Cetkovich, did you ever have occasion to meet [50] Mr. Lou Colbert?

A. Yes, I are.

Q. When did you first meet him?

A. I met him over to Thelma's place over there.

Q. And do you remember what year that was?

A. No, I can't tell you for sure. I have records of it.

Appellant's Exhibit A-1—(Continued)  
(Testimony of Mr. John Cetkovich.)

Q. Do you remember it was in the year 1946?

A. Somewhere around there.

Q. Could it have been in 1947?

A. Around there somewhere. I can't tell you for sure. I was trying to look some records, but I throwed them away.

Q. Were you working over there, Mr. Cetkovich?

A. Yes, I was.

Q. What was your job?

A. I was cook.

Q. And did you ever have occasion to see Mr. Colbert there for dinner?

A. Every day.

Q. Every day?

A. Yes, sir.

Q. Where did Mr. Colbert live at that time?

A. He live right at the club there.

Q. Did he have a bunk or did he have a room?

A. No, he had a room upstairs.

Q. Did you have occasion to go up to his [51] room?

A. Yes, I did.

Q. For what purpose?

A. I took food to him, books and papers.

Q. Did you have a conversation with him?

A. I talked mining and various things.

Q. Did you do this on more than one occasion?

A. Several occasions. Each night he used to talk and I used to go for newspapers.

Q. How long did you work over at Circle Bar?

A. I should say I worked there around four months.

Q. And you don't remember what time of the year that was?

A. No, I don't.

Appellant's Exhibit A-1—(Continued)

(Testimony of Mr. John Cetkovich.)

Q. Was it in the fall of the year or the winter?

A. I come there I think in February if I'm not mistaken and I stayed there until about first of June.

Q. About the first of June?

A. First of June, around there, 10th or 15th.

Q. Did Mr. Colbert go to the hospital while you were working over there?

A. They took him to the hospital from there. He died in the hospital.

Q. Do you know who took him to the hospital?

A. An ambulance come out to him. I don't know who it was.

Q. I will ask you if you know what the condition of the room where he stayed? Was it clean or dirty? [52]

A. Absolutely was in good shape.

Q. And who kept that——

A. Well, Thelma kept it.

Q. Do you know who paid for it?

A. I don't. No.

Q. Did Mr. Colbert always have plenty to eat?

A. Absolutely, yeah.

Q. Do you have an opinion as to the state of his mind at the time he was over there?

A. Yes, I do.

Q. What is that opinion, Mr. Cetkovich?

A. I think he was a very smart man.

Q. Why do you say that?

Appellant's Exhibit A-1—(Continued)  
(Testimony of Mr. John Cetkovich.)

A. Because he talked sensible all the time. He was very well educated man.

Q. Did he ever do anything that was peculiar?

A. No, sir; at no time, at no place.

Q. Did he ever try to set the house on fire?

A. No, sir.

Q. Never did anything out of the way during——

A. No, sir; he was a gentleman in all walks of life.

Q. Who lived there at the same time, Mr. Cetkovich, if you recall?

A. Well, Thelma and there was a maid and a couple of bartenders. I can't recall their names. There was quite a [53] few people living around there, janitors. I can tell you for sure. I can't recollect right now, but I——

Q. Was Thelma's mother living there, Mrs. Gregor?

A. No.

Q. She wasn't living there at the time?

A. No, she wasn't.

Q. Did Mrs. Gregor come around there?

A. Yes, she come around there once in a while.

Q. Did she ever talk to Mr. Colbert?

A. Naturally, she says, "Hello, Lou," that's all.

Q. They were friendly?

A. Friendly, absolutely they were, yeah.

Q. Did Mr. Colbert have any enemies that you knew of?

A. None that I know of.

Appellant's Exhibit A-1—(Continued)

(Testimony of Mr. John Cetkovich.)

Q. As a matter of fact he got along with people very well?

A. Oh—excuse me. He was a very fine man. He was a very fine gentleman. Everybody liked him around there and everybody helped him out.

Q. Do you know whether or not he had any money?

A. No, I don't. I can't tell you that.

Mr. McCarrey: That's all. May be cross-examined, Mr. Hurley.

Cross-Examination

By Mr. Hurley:

Q. You say—what was his condition just before they took [54] him to the hospital?

A. Well, he was crippled naturally. He couldn't get around. We used——

Q. Was there anything else wrong with him?

A. No, not that I know, Mr. Hurley. His mind, I don't think was anything wrong with the man.

Q. Do you know anything about his powers, that he couldn't hold himself?

A. Well, his foot was on the bum.

Q. What? A. His legs was on the bum.

Q. How about his digestive apparatus? Did you know anything about that? A. No.

Q. Did you know anything about his control of his water?

A. He's never complained to me about anything like that.



Appellant's Exhibit A-1—(Continued)  
(Testimony of Mr. John Cetkovich.)

Q. You never knew anything about that conditions—those conditions at all?

A. No, but I know that Thelma used to go and take care of him.

Q. You didn't know anything about that?

A. But he was sick half the time there and he didn't want to go to the hospital. He told me that himself.

Mr. Hurley: That's all.

#### Redirect Examination

By Mr. McCarrey:

Q. Do you know why he didn't want to go to the hospital? [55]

A. No. I'll tell you sincerely before this court he said, "I would rather die here in this place than go over there and die." That's the very words he spoke to me.

Q. Did Mrs. Gregor ever have—Mrs. Hayes ever have a doctor for him at the house?

A. Yes, she called a doctor for him. She wanted him to go to the hospital just a couple of days before they took him and he refused to go.

Mr. McCarrey: That's all.

#### Recross-Examination

By Mr. Hurley:

Q. Who was the doctor, John?

A. Well, I couldn't tell you that, Mr. Hurley.

Appellant's Exhibit A-1—(Continued)

(Testimony of Mr. John Cetkovich.)

I couldn't tell you for sure, but I know he was a——

Q. You don't know who the doctor was?

A. No, I didn't look at the——

Q. You didn't see the—did you see the doctor?

A. No, I didn't, but he was there.

Q. How do you know?

A. Because they took him out to the hospital that same night.

Q. You didn't see the doctor. How do you know the doctor was there?

A. Yes, but he was there. The ambulance come after the man. [56]

Q. Was it Doctor Schaible?

A. I think so. I don't know for sure.

Q. Was he under any doctor's care prior to the time they took him to the hospital that you know of?

A. I don't know. I couldn't tell you that for sure.

Q. You don't know about that?

A. No, I can't tell you for sure.

Mr. Hurley: That's all.

Mr. McCarrey: That's all. Thanks very much.

Witness: Your Honor, do I have to come back?

Mr. McCarrey: Excuse him, your Honor.

The Court: You're excused.

Witness: Thank you very much gentlemen.

(The witness left the stand.)

Appellant's Exhibit A-1—(Continued)

Mr. McCarrey: Call Mrs. Gregor.

The Court: What's that name again?

Mr. McCarrey: Gregor. G-r-e-g-o-r.

CECELIA H. GREGOR

called as a witness in behalf of the Petitioner, being first duly sworn, testified as follows:

Direct Examination

By Mr. McCarrey:

Q. Will you state your name please? Will you state your name please? [57]

A. Cecilia H. Gregor.

Q. And are you the mother of Thelma Gregor Hayes? A. I am.

Q. Where do you live, Mrs. Gregor, at the present time?

A. In Anchorage, at the present time.

Q. Did you ever live in Fairbanks, Alaska?

A. For a period of about 12 years.

Q. When did you first come to Fairbanks?

A. Christmas night in 1938.

Q. 1938? A. That's right.

Q. Now, Mrs. Gregor, did you ever know a gentleman by the name of Louis D. Colbert, more commonly known as Lou Colbert? A. I did.

Q. And when did you first meet Mr. Colbert?

A. In 1940, in about January, 1940. I was working for Dick Woods.

Q. How did you happen to meet Mr. Colbert, Mrs. Gregor?

Appellant's Exhibit A-1—(Continued)

(Testimony of Cecilia H. Gregor.)

A. I was working for Richard Woods and I cooked and served the dinner there. Lou was invited to the dinner. It was a business discussion between him and Mr. Woods and Robert Sheldon who was then Postmaster. He was also there.

Q. Did you ever have occasion to see Mr. Colbert after that time?      A. Very many times.

Q. Will you tell the court in detail about your acquaintanceship with Mr. Colbert? [58]

A. Well, I met him many times at Thelma's dinners and then he was at my house. He used to come to my house for dinner with my husband and myself.

Q. For what purpose did he come to your house, Mrs. Gregor?      A. Just as friends.

Q. As a matter of fact, he was very friendly toward Mr. Gregor, was he not?

A. Absolutely, yes. They were very good friends.

Q. Now, how often did he come to visit you, Mrs. Gregor?

A. Well, after he—he used to walk clear from his place up here near Gillam Way and he used to go up there and visit us there all through the—from about 1943 all up until just before he went to the hospital. He used to walk up to our place.

Q. And how frequently would he do that?

A. Well, after he moved to Graehl, after he went there to live, two or three times a week.

Q. Would he stay long periods of time?

A. Yes, he would visit and stay all afternoon



Appellant's Exhibit A-1—(Continued)  
(Testimony of Cecilia H. Gregor.)

sometimes, late after dinner and we would take him home.

Q. Did Mr. Colbert have any money that you know of?

A. I believe he had, but how much I couldn't say.

Q. How—what leads you to believe he had some money, Mrs. Gregor?

A. Well, he had property and Lou seemed to have plenty for [59] whatever he wanted to do.

Q. Did Mr. Colbert ever loan any money?

A. I think he loaned money to Thelma. I don't know and to other people too, but not to us.

Q. But you do know he loaned money to other people, too?      A. Yes.

Q. On more than one occasion?

A. Oh, yes. I am quite sure of that.

Q. Now, calling your attention to the year 1946. Where were you at that time, if you recall?

A. Where was I?

Q. Yes.

A. I was living up home there in Graehl.

Q. Did you have occasion to see Mr. Colbert frequently during that year?

A. Yes, I would visit him in the hospital when he was in the hospital.

Q. I will ask you if you know what was his physical condition at that time?

A. In 1946, my husband passed away in January 16, 1947. Mr. Colbert was at the funeral and



Appellant's Exhibit A-1—(Continued)

(Testimony of Cecilia H. Gregor.)

visited my place after that. His physical condition was fine.

Q. Well, did he have any trouble with his legs, Mrs. Gregor?

A. Well, yes. He did complain about his [60] legs.

Q. Did he lose a lot of weight if you recall?

A. Well, no. I can't say that he lost any weight.

Q. What was the status of his mind with reference to business if you know at that time?

A. Keen.

Q. What makes you say that?

A. Because he was a business man and he was very thorough.

Q. And did you notice any change during the summer of 1946 or fall?

A. Absolutely no, not in 1946.

Q. Was there any change in 1947? A. No.

Q. Was there any change in his physical condition in 1947? Did he get better or worse?

A. Just his legs. He complained about his legs, didn't know whether it was rheumatism or what. He complained about his legs, I think.

Q. I will ask you if you know whether or not he had any occasion to go to the hospital?

A. I beg your pardon?

Q. I will ask you if you know whether or not Mr. Colbert had occasion to go to the hospital in Fairbanks? A. Well, twice, yes.

Appellant's Exhibit A-1—(Continued)  
(Testimony of Cecilia H. Gregor.)

Q. Did you visit him while he was in the hospital?      A. I did. [61]

Q. On more than one occasion?

A. Oh, yes.

Q. I will ask you if you know if there was any change in his mental condition at that time?

A. No.

Q. And you state that he went to your husband's funeral in January of 1947?

A. We had a very cold winter. It was 25 days before we could hold that funeral. My husband died on the 16th of January. It was on the 9th of February that we had the funeral and Mr. Colbert was at the funeral.

Q. And what was his mental condition at that time, if you know?      A. Perfect.

Q. Did you talk to him that day?

A. I certainly did.

Q. And did he talk with other people?

A. Yes.

Q. And you—were you able to hear the conversation he had with other people on that day?

A. Yes.

Q. Was it an intelligent or sane conversation?

A. Yes.

Q. Did it make sense?      A. Certainly. [62]

Q. I will ask you if you know—strike that. I will ask you if you think Mr. Colbert was ever mentally incompetent?

A. At no time that I know of. At no time.

Appellant's Exhibit A-1—(Continued)

(Testimony of Cecilia H. Gregor.)

Q. And you are very well acquainted with him?

A. Very well acquainted.

Q. Do you recall when Mr. Colbert went to live with your daughter, Mrs. Hayes, or about?

A. I couldn't say exactly, but I believe that he went to live with her after he came out of the hospital the second—the first time.

Q. Did you have occasion to go to his room, at his place at Graehl?           A. Oh, yes.

Q. How was he taken care of?

A. He was taken good care of.

Q. How do you know?

A. I was there and saw it.

Q. Was the room clean?           A. Yes.

Q. And did he have something to eat?

A. Plenty, everything he wanted.

Q. Who paid for it?

A. I couldn't say. I suppose he did.

Mr. McCarrey: That's all. [63]

Cross-Examination

By Mr. Hurley:

Q. Did you know about his loaning money to Thelma?           A. Yes.

Q. And did you ever know of her paying any of it back?           A. Yes.

Q. What?           A. Yes.

Q. Did she ever pay any back?           A. Yes.

Q. When?

Appellant's Exhibit A-1—(Continued)  
(Testimony of Cecilia H. Gregor.)

A. Well, whenever they could come to—when-  
ever she was supposed to pay, I believe.

Q. What?

A. When she was supposed to pay it, I believe.  
I don't know about that.

Mr. Hurley: That's all.

### Redirect Examination

By Mr. McCarrey:

Q. Mrs. Gregor, did Mrs. Hayes ever assist Mr.  
Colbert with his business? A. Yes.

Q. In what respect?

A. Well, I believe she kept books for him and  
took care of—seen people for him at times. [64]

Q. How long a period of time did she do that if  
you recall?

A. Since when he came from the hospital the  
first time.

Q. Did she ever do it before?

A. I couldn't say for sure. I don't know.

Q. Did Mr. Colbert loan money more than one  
time to Mrs. Hayes, your daughter? A. Yes.

Q. On several occasions? A. Yes.

Q. Do you remember about the first time he ever  
loaned money to her?

A. I could not say definitely for sure.

Q. You stated on cross-examination that Mrs.  
Hayes paid back Mr. Colbert. Did you ever see her  
at any time pay money back to Mr. Gilbert?

Appellant's Exhibit A-1—(Continued)

(Testimony of Cecilia H. Gregor.)

A. No.

Q. How do you know she paid it back then?

A. I saw receipts.

Q. Where did you see those receipts?

A. Up there at Graehl Bar. I saw the receipts there at Graehl Bar and since.

Mr. McCarrey: That's all.

Recross-Examination

By Mr. Hurley:

Q. You saw the receipts when? [65]

A. I saw them up there at Graehl Bar before Mr. Colbert passed away and then I saw them since.

Mr. Hurley: That's all.

Mr. McCarrey: One more question, your Honor.

Q. (By Mr. McCarrey): Did Mrs. Hayes ever send money to you to pay to Mr. Colbert?

A. Yes, she did when she was in Nome.

Q. On more than one occasion? A. Yes.

Q. Do you remember any sums of money at any one time?

A. Well, it was—she wired it and I took it out to his place. He wanted it in lump sums.

Q. If you recall. It isn't too important.

A. Well, it was—one of them she sent \$300, another time two hundred, and another time \$150 that I remember.

Q. Wasn't there a strong feeling of friendship



Appellant's Exhibit A-1—(Continued)  
(Testimony of Cecilia H. Gregor.)

between Mr. Colbert and Mrs. Hayes over a long period of time?

A. Yes, he was just like a father to her.

Q. As a matter of fact, didn't she discuss with him whenever she wanted to go in business or before she went in business? A. That's right.

Q. To get his advice on things?

A. Yes. [66]

Q. And it was more than an acquaintanceship, it was a friendship? A. A friendship.

Mr. McCarrey: That's all.

#### Recross-Examination

By Mr. Hurley:

Q. When were these sums, these \$300, \$200 and \$150 paid? Was that in the summer of 1946 or was it in 1945?

A. I can't believe that was in 1945 and 1946. I can't remember just exactly when she was in Nome.

Q. What? A. When she was up in Nome.

Q. That was before quite a long time before he went to the hospital? A. Oh, yes.

Mr. Hurley: That's all.

Mr. McCarrey: That's all.

(The witness left the stand.)

Mr. McCarrey: Your Honor, it is 12 o'clock. Could we take a recess until 1:30 instead of 2?

Appellant's Exhibit A-1—(Continued)

I think it will take most of the afternoon and Mr. Court Reporter, Mr. Belida has a case at 2 o'clock so we would like to expedite as much as possible.

Mr. Hurley: I think we can finish by five o'clock if we start at quarter past two. I don't think it [67] will take a great deal of time for our witness.

Mr. McCarrey: Well, I have reason to believe to the contrary, Mr. Hurley. I hope I am wrong.

Mr. Hurley: How many more witnesses do you have?

Mr. McCarrey: I have——(Interrupted)

Mr. Hurley: The bank witnesses will be short won't they?

Mr. McCarrey (Continuing): About three or four more.

Mr. Hurley: That's including the bank witness?

Mr. McCarrey: Yes, that's correct.

Mr. Hurley: They will be short, won't they?

Mr. McCarrey: I would think so.

Mr. Hurley: Well, I don't think it will take more than the afternoon myself. I don't care. The court can consider it themselves. We will just get started when we have to get out.

Mr. McCarrey: Since I am out of town and would like to leave tomorrow for sure, while Mr. Hurley might be right, I would like to start at 1:30.

The Court: Very well, court will adjourn until 1:30 and then we will have to adjourn just before two in order to allow the District Court to——

Mr. McCarrey: Thank you.

Appellant's Exhibit A-1—(Continued)

(Court adjourned at 12 o'clock, June 16, 1950, to reconvene at 1:30 p.m.) [68]

(The court reconvened at 1:30 p.m.)

Mr. McCarrey: Your Honor, we have another witness. I would like to ask permission to put on Mrs. Hayes at this time. I'll try to withdraw as soon as the other gentlemen come in. I ask at this time for Mrs. Thelma Hayes to be sworn.

THELMA GREGOR HAYES

called as a witness in her own behalf, being first duly sworn, testified as follows:

Direct Examination

By Mr. McCarrey:

Q. Will you state your name, please?

A. Thelma Gregor Hayes.

Q. And where do you reside, Mrs. Hayes, at the present time?      A. Anchorage.

Q. Did you have—ever have the occasion to meet a gentleman by the name of L. D. Colbert, more commonly known as Lou Colbert?

A. Many times.

Q. Just answer the question. Did you have occasion to meet him?      A. Yes.

Q. When?      A. First in 1937. [69]

Q. Whereabouts?

A. I was playing an accordion at the California Bar.

Appellant's Exhibit A-1—(Continued)

(Testimony of Thelma Gregor Hayes.)

Q. Did you have occasion to see him frequently?

A. Yes. He used to come by and listen and ask me to play a tune for him.

Q. Did Mr. Colbert ever come in the bar?

A. No, he never went in the bar, just sent messages in to ask me to play certain songs.

Q. At any rate, he didn't come in the bar?

A. He didn't drink.

Q. Did you have frequent visits with Mr. Colbert from that time up until the time he died?

A. Yes, I did.

Q. Will you tell the Court in detail what you know about Mr. Colbert from the first time you met him?

A. Well, first time I met him was when he came to listen to me play and then he used to meet me and walk and carry my accordion sometimes before I go to work 7:30 to 8. So I made a loan from him. It was in 1939, my first loan.

Mr. McCarrey: (Handing witness microphone) Pardon me, Mrs. Hayes, would you hold that three or four inches from your mouth and talk into it?

Q. Go ahead, please.

A. And then I met him frequently every week. I made many loans and paid them back during our visits from 1937 until he died. [70]

Q. Now, what was the relationship between you and Mr. Colbert? Was there anything of a personal nature about it?

A. No. We were just very good friends from the



Appellant's Exhibit A-1—(Continued)  
(Testimony of Thelma Gregor Hayes.)

time—first time I met him. He advised me with business affairs. He loaned me money to first start my business and he suggested I go into business for myself.

Q. Was he sweet on you?

A. No, nothing like that. We were just good friends. He was just like a father to me.

Q. Now, you stated that he made a number of loans from time to time, is that correct?

A. That's right.

Q. Did you pay all those loans back?

A. Yes, I did.

Q. Did he do anything to protect himself in the way of loans?

A. Well, sometimes we drew up a contract, and sometimes we drew up mortgages, sometimes just borrow money and give it back to him.

Q. Now, I will ask you if you know whether or not Lou Colbert was acquainted with any other members of your family?

A. He knew my folks very well. As soon as my father came up here, they become very good friends.

Q. And did Mr. Colbert ever go and visit your father and mother? [71]

A. Regularly. They used to have him over for dinner regularly.

Q. I call your attention to the year 1946. Where were you at that time if you know?

A. At the time, Graehl Circle Bar, in Fairbanks, Alaska.



Appellant's Exhibit A-1—(Continued)

(Testimony of Thelma Gregor Hayes.)

Q. Was Mr. Colbert in Fairbanks at that time?

A. Yes, he was.

Q. What was he doing if anything?

A. At what date was that?

Q. Well, during the year 1946?

A. Well, he lived at a—first part of the year 1946 he was staying at a house in Gillam Way.

Q. And was he engaged in business?

A. Well, he used to loan lots of money to different people.

Q. Did he loan money during the year 1946?

A. Yes, he did.

Q. Do you know anyone he loaned it to?

A. Several people.

Q. Can you name one?

A. Well, Howard Sparks.

Mr. Hurley: Who?

Witness: Howard Sparks.

Q. (By Mr. McCarrey): Anybody else?

A. And—I can't recall the names right off myself. [72]

Q. Did he loan some to you?

A. Yes, he did.

Q. Now, calling your attention to the summer of 1946, I will ask you if you know where Mr. Colbert was?

A. Summer of 1946?

Q. Yes.

A. He was in—at this place on Gillam Way.

Q. I will ask you if you know anything about

Appellant's Exhibit A-1—(Continued)  
(Testimony of Thelma Gregor Hayes.)

him personally as to his physical condition at that time?

A. Well, I used to go see him every week, twice a week or so. I would drive out there and he complained of having rheumatism.

Q. Whereabouts?

A. In his right arm and shoulder, hurt him terribly bad with rheumatism.

Q. Did he have any other ailments?

A. He had some rheumatism in his legs.

Q. As a matter of fact, it was a little hard for him to stand?

A. At that time it wasn't so bad. However it was in his arm it was bothering him terribly.

Q. Aside from that, what was his physical condition?

A. He was healthy aside from that. It was his complaining of his rheumatism that I used to go out and clean the house for him. He couldn't bend over too good and I used to wash the dishes for him. [73]

Q. Did you charge for those trips you made out there?      A. No, we were just friends.

Q. Now, you stated, Mrs. Hayes, that he advised you about business from time to time, is that correct?

A. I talked over my business dealings with him. He used to tell me his business deals.

Q. Do you have an opinion as to his business ability?

Appellant's Exhibit A-1—(Continued)

(Testimony of Thelma Gregor Hayes.)

A. He was a wonderful business man.

Q. What makes you say that?

A. He seemed to know the answers to everything, all about everything.

Q. Well, did Mr. Colbert have any money?

A. He seemed to have.

Q. Do you know how much he had?

A. No, I don't know exactly.

Q. What made you think he had money?

A. Well, he was always able to loan every one money that needed it, that desired it and in the summer he loaned money in that same manner to Leland. There was a list of names he loaned small loans to, \$200, and \$100, \$300.

Mr. McCarrey: Your Honor, I'll move on this side here. The witness has a tendency not to speak in the micophone.

Q. You knew Mr. Colbert for a long period of time. What kind of reputation did he have around Fairbanks, Alaska? [74]

A. He had a very good reputation. He was very well known by many people here.

Q. What is his reputation as to business ability and acumen?

A. He was supposed to be very intelligent business man.

Q. Now, calling your attention to on or about the 22nd day of October, 1946. I will ask you if you know where you were at that time?

A. Well, where I lived?

Appellant's Exhibit A-1—(Continued)  
(Testimony of Thelma Gregor Hayes.)

Q. Yes.

A. I was at the Graehl Circle Bar.

Q. And I will ask you if you know where Mr. Colbert was at that time?

A. He was in the hospital at that time.

Q. Do you know when he went to the hospital?

A. Well, around the first part of October, I think it was.

Q. At whose request did he go to the hospital?

A. At my request.

Q. Why did you send him to the hospital?

A. I used to go over every day and fix supper and I was—it was pretty hard to wash dishes and clean up for him and I suggested he go to the hospital and help him get better faster.

Q. What was his problem at that time physically?

A. He complained of the rheumatism, it hurt so bad and that he couldn't bend and fix the fire with his arm hurting him. [75] He had a wood stove in his house. So that's why I thought if he went and stayed in the hospital I thought he would feel better.

Q. Now, I will ask you whether or not you know that Mr. Colbert made a will before he died?

A. Yes, I do.

Q. Do you know about what time he made a will?

A. Well, I know he talked about making a will in the summer before he went to the hospital to me.

Q. Did he discuss it with you?



Appellant's Exhibit A-1—(Continued)

(Testimony of Thelma Gregor Hayes.)

A. Yes. He asked me over and over which attorney I thought we should go to and make his will out. He said he would like to make a new will out.

Q. And did he have any other discussion what he was going to do with his property with you?

A. Well, he used to talk of his mining claims.

Q. What did he say about his mining claims if you know?

A. Well, he was going—he wanted to start operating the tungsten claims and things he was waiting for reports back from the Bureau of Mines.

Q. This was in the sumemr of 1946, was it?

Mr. Hurley: What's that answer about the claims?

Witness: He was talking of operating from the tungsten claims, starting to start operation on some of them. [76]

Q. (By Mr. McCarrey): Did he talk to you, Mrs. Hayes, about his will more than one occasion?

A. Yes, many occasions.

Q. Who brought up the conversations?

A. He did.

Q. What was said if you recall?

A. He used to say, "Well, Thelma," he says, "I would like to make a will out and I would like to get your advice on which attorney I should get to make a will out" and he thought that he would like to see Collins & Clasby and he asked me if I would drive him down. He said, "I would like to see Collins & Clasby and have a will made out."

Q. Did you ever do that?



Appellant's Exhibit A-1—(Continued)  
(Testimony of Thelma Gregor Hayes.)

A. So I told him whenever he felt like it well I would take him down and he shouldn't talk about dying. He said, "I may not live too long and I would like to have this will made out."

Q. Did he say that?

A. That's what he said, yes. I didn't like to hear him talk about dying and things like that. I used to think that was just a sad frame of mind for people to be in to talk about that.

Q. Was Mr. Colbert in a sad frame of mind at that time?

A. No. But I thought any time he talked about dying, it [77] was just—he used to say that he wanted to make his will and he would like me to take him down to see Clasby & Collins.

Q. Now Mrs. Hayes, did Mr. Colbert have any relatives?

A. Yes, he had a sister by the name of Emma Colbert.

Q. Anybody else?

A. And he had a brother.

Q. Anybody else?

A. That's all. Whenever he mentioned his brother he said he was very well to do and owned some woolen mills or something like that, pulp mills back east.

Q. Did he——

A. He says his sister was very old and that she was very well fixed. I used to write letters for him to his sister, for years, and come over and

Appellant's Exhibit A-1—(Continued)

(Testimony of Thelma Gregor Hayes.)

dictate letters and sign the letters and sent them to her.

Q. By the way, did you ever assist Mr. Colbert in any of his transactions of business?

A. Years back he had me come over and half the time I would copy some transactions in a book that he would make out with different people small different deals, small loans, all of his regular pay outside and he would get me to write in a book so it would be easier for him to keep a track of.

Q. I will ask you if you know whether or not Mr. Colbert kept fairly good records?

A. Well, he had set up a pretty good record. Everything [78] that he would do, he would make notes and lots of papers and records. We would copy them down in a book.

Mr. McCarrey: I want to mark this for identification (handing document to Court).

(Document handed to court was marked and received as Petitioner's Exhibit 6 for identification.)

Q. (By Mr. McCarrey): What kind of script did Mr. Colbert have? Was he a good penman or bad penman?

A. Well, he could write very plain. He would just write everything down, the dates and what they were and he asked me to copy it in the book for him.

Q. Was he neat about his work particularly?

Appellant's Exhibit A-1—(Continued)  
(Testimony of Thelma Gregor Hayes.)

A. Oh, yes.

Q. Did he write in a large hand or small hand?

A. Large hand I think.

Q. Now, I ask—I hand you a piece of paper and ask if you can identify that? A. Yes.

Q. What is it if you know?

A. That's Lou Colbert's writing.

Q. How do you know that's Lou Colbert's handwriting?

A. Well, this is the way he used to write. I seen this writing.

Q. Have you ever seen that before? [79]

A. Yes.

Q. When did you see it before?

A. Well, he had these papers, everything had to be written down on paper and when I—when he asked me to copy it in the book for him.

Q. Do you know that to be Mr. Colbert's handwriting? A. Yes, it is.

Q. I will ask you if you know where that has been since Mr. Colbert's death?

A. Well, he had a little green box that he had kept all these papers in and he gave it to me.

Mr. McCarrey: I ask that be——

Q. (By Mr. McCarrey): Has that been in your possession all this time?

A. Yes, it has.

Q. And that's his writing? A. Yes.

Mr. McCarrey: I will offer it in evidence, your Honor.

Appellant's Exhibit A-1—(Continued)

(Testimony of Thelma Gregor Hayes.)

Mr. Hurley: No objection.

The Court: Be marked Petitioner's Exhibit "F."

Mr. McCarrey: Thank you.

(The document previously received for identification as Petitnoner's Exhibit 6, was received in evidence and marked Petitioner's Exhibit "F.") [80]

Q. (By Mr. McCarrey): Now you stated that he wrote most of these things down?

A. Yes.

Q. And is this characteristic of what he used to write down of his business affairs?

A. Yes. He used to write everything on one sheet, sometimes on a tablet that way and when I come over I would copy them.

Q. You notice at the top there is a name, "Kelly"? A. Yes.

Q. Do you know whether or not Mr. Colbert knew a Kelly? A. Yes, he did.

Q. Who was Mr. Kelly?

A. He was a very good friend of his.

Q. Did Mr. Colbert ever have any business dealings with Mr. Kelly?

A. I think a lot of business dealings. Mr. Kelly handled most of his affairs.

Q. Do you know where Mr. Kelly is now?

A. He's dead now.



Appellant's Exhibit A-1—(Continued)  
(Testimony of Thelma Gregor Hayes.)

Mr. McCarrey: May I have Exhibit "E" please your Honor?

Q. (By Mr. McCarrey): I hand you Petitioner's Exhibit "E" and ask if you know what that is? [81]

A. Yes. That is a power of attorney made by Mr. Colbert.

Q. Do you know for what purpose that was made?

A. Well, when Lou was sick, he wanted things and needed things and not have to worry about his affairs and he wanted to make a power of attorney out so that I could do things for him.

Q. Was that ever given to you?

A. Yes, it was.

Q. Did you ever use it?

A. Well, I started to use it. I paid some of his bills and accounts according to his directions and I used it about a week. That was all.

Q. Did anybody ever refuse to acknowledge it?

A. Yes. Mr. Stroeker refused when I went to cash a check for him.

Q. Do you know why that was refused?

A. Well, Lou wanted me to cash a check and I went to cash the check and Mr. Stroeker, he wouldn't let the check go through.

Q. Did you ever speak to Mr. Stroeker about that? A. Yes.

Q. What did Mr. Stroeker say if anything?

A. He said that they were starting some suit



Appellant's Exhibit A-1—(Continued)

(Testimony of Thelma Gregor Hayes.)

to stop that. They were going to make a new power of attorney, make a new power of attorney. [82]

Q. Now, I will ask you if Mr. Colbert ever authorized you to do any other business for him in the fall of 1946?

A. Well, there was lots of things he asked me to do.

Mr. McCarrey: I will have this marked for identification please.

The Court: Petitioner's Exhibit number 7.

(Document handed to the court and marked Petitioner's Exhibit number 7 for identification.)

Q. (By Mr. McCarrey): Thank you. I hand this to you and ask if you know what that is?

A. This is an authorization for me to get some things out of his safe deposit box for him.

Q. When was that issued to you?

A. That was on October 23, 1946.

Q. And did you ask for that privilege and permission?

A. No, he asked me to go to this deposit box. He wanted to get some papers he had, some notes and papers and some things from his box he wanted to have explained to me.

Q. Do you know who prepared that?

A. No, I don't know. I just know that he gave me this paper and asked me to go to his box and get some things and the key to it.

Appellant's Exhibit A-1—(Continued)  
(Testimony of Thelma Gregor Hayes.)

Q. Whose signature appears there on if you know? A. Well, Lou Colbert's. [83]

Q. Was it witnessed?

A. It is witnessed, yes.

Q. Do you know any of the witnesses?

A. Well, I know one witness, Mr. Arthur A. Benz.

Mr. McCarrey: May we have this as Petitioner's Exhibit number "G"?

(The document previously received and marked as Petitioner's Exhibit number 7 for identification, was received in evidence and marked Petitioner's Exhibit "G.")

Q. (By Mr. McCarrey): Did you ever have occasion to use that authorization, Mrs. Hayes?

A. Well yes. I went over to the place to get the—to get in the box to get the things he asked me to deliver. They wouldn't let me in. They said Mr. Stroeker had orders not to let me in the box.

Q. About what time did you go over there?

A. Well, he had given it to me in the afternoon and I went right over.

Q. Was it about that same day that you was there? A. Yes.

Mr. McCarrey: I would like to read for the record, your Honor?

The Court: What?

Mr. McCarrey: I would like to read it into the record. "Fairbank, Alaska, October 23rd, 1946. [84]"

Appellant's Exhibit A-1—(Continued)

(Testimony of Thelma Gregor Hayes.)

Fairbanks Agency Company, Fairbanks, Alaska.  
Dear Sirs: This will authorize you to allow Thelma Hayes to have access to my safe deposit box in you place of business. Very truly yours L. D. Colbert.”  
Witnessed by Kenneth D. Wire, W-i-r-e. Witnessed further by Arthur A. Benz.

Q. (By Mr. McCarrey): And you say that you have been refused permission to go over and get into the safe deposit box the same day that was given to you?       A. Yes.

Q. And they advised you that Mr. Stroecker had stopped that, is that correct?

A. Yes, that's right.

Q. Is that on or about the 23rd day of October?

A. Yes.

Q. By the way, Mrs. Hayes, do you recall what that power of attorney authorized you to do?

A. Well, it was just to act in his behalf to help him take care of his affairs under his instructions.

Mr. McCarrey: Your Honor, I would like to have these marked for identification as one exhibit rather than to have it as several exhibits for identification if you please.

The Court: This would be Petitioner's Identification number eight. [85]

(Documents handed to the court were received and marked as Petitioner's Exhibit for identification 8.)

Mr. McCarrey: To save time, your Honor, I

Appellant's Exhibit A-1—(Continued)  
(Testimony of Thelma Gregor Hayes.)

would like to put this as part of it too, if you don't mind.

(Mr. McCarrey handed the court a paper.)

The Court: I believe at this time we could possibly adjourn.

Mr. McCarrey: Very well.

The Court: We will reconvene as soon as the District Court has finished.

Mr. McCarrey: Very well.

(At 2:00 p.m. the Court adjourned and reconvened at 2:20 p.m.)

The Court: Are you ready to proceed, Mr. Taylor?

Mr. Taylor: We will have to wait just a moment for examining counsel, your Honor.

The Court: Very well.

Mr. McCarrey: I believe we have identified these exhibits?

The Court: Yes.

Mr. McCarrey: Or were in the process.

(Mrs. Thelma Gregor Hayes, previously having been sworn, resumed the stand.)

Q. (By Mr. McCarrey): Mrs. Hayes, I hand you various pieces of paper and ask [86] if you can identify them?

A. That's a bank statement of Lou Colbert.

Q. And——

A. Various checks written by him.



Appellant's Exhibit A-1—(Continued)

(Testimony of Thelma Gregor Hayes.)

Q. Where have those checks been and the statement since Mr. Colbert's death if you know?

A. Well, I had them over in this box of things he gave me.

Mr. McCarrey: Your Honor, we offer these in evidence as Petitioner's Exhibit "I."

The Court: "H."

Mr. McCarrey: "H"?

Mr. Hurley: No objection.

(Documents previously marked Petitioner's Exhibit 8 for identification were received in evidence and marked Petitioner's Exhibit "H.")

Mr. McCarrey: May I offer this in for identification while counsel is looking those over?

The Court: Identification number nine.

(Document handed to the court was marked Petitioner's Exhibit 9 for identification.)

Mr. McCarrey: Your Honor, we might fix this to it to save time right to the same one.

The Court: This is identification number 10. Petitioner's Exhibit for identification number 10.

(Document handed to the court by Mr. McCarrey was marked for identification as Petitioner's Exhibit 10.) [87]

Mr. McCarrey: We offer these in evidence your Honor for petitioner.



Appellant's Exhibit A-1—(Continued)  
(Testimony of Thelma Gregor Hayes.)

The Court: Petitioner's Exhibit "H."

Q. (By Mr. McCarrey): I hand you this piece of paper and ask if you know what that is, Mrs. Hayes?

A. This is a copy of a mortgage, a real mortgage made between Lou Colbert and I in 1943.

Q. And does your signature appear thereon?

A. Yes, it is.

Mr. McCarrey: We offer that in evidence, your Honor.

Q. (By Mr. McCarrey): I hand you another for identification.

A. This is the copy of another mortgage between Lou Colbert and I.

Q. And the date please.

A. 1946, January, 1946.

Q. Does your signature appear thereon?

A. Yes.

Q. Who prepared that if you know?

A. I'm not just sure. I am not just sure.

Q. Does the attorney's name appear as witness? Could Mr. Taylor have drawn it? Gradelle Leigh?

A. It probably would be Mr. Taylor. [88]

Q. I will ask you if you know who prepared this original mortgage?

A. E. B. Collins. No, Mr. Clasby prepared it.

Q. At whose request? Your request or Mr. Colbert's request if you remember?

A. No, I don't remember. We agreed upon everything.

Appellant's Exhibit A-1—(Continued)

(Testimony of Thelma Gregor Hayes.)

Mr. McCarrey: Your Honor, we offer this in evidence then.

The Court: May be marked Petitioner's Exhibit "I."

(Document previously marked as Petitioner's Exhibit 9 for identification was received and marked Petitioner's Exhibit "I" in evidence.)

Mr. McCarrey: We offer this in evidence, your Honor, mortgage of 22nd day of January, 1946, between Thelma Gregor Hayes as mortgagor and Lou Colbert as mortgagee.

The Court: This be marked as Petitioner's Exhibit "J."

(Document previously marked Petitioner's Exhibit 10 for identification, now received in evidence and marked Petitioner's Exhibit "J.")

Q. (By Mr. McCarrey): Mrs. Hayes, I think you testified before that you made payments back to Mr. Colbert on your mortgage, is that correct?

A. Yes, that's right. [89]

Mr. McCarrey: I ask that this be marked for identification, if it please the Court.

The Court: Petitioner's identification number 11.

(Document handed the court was marked as Petitioner's Exhibit number 11 for identification.)

Appellant's Exhibit A-1—(Continued)  
(Testimony of Thelma Gregor Hayes.)

Q. (By Mr. McCarrey): I hand you this piece of paper and ask you if you can identify that?

A. That was our receipt for—from me to Lou Colbert.

Q. Is it from you to Lou Colbert or from Lou Colbert to you?      A. From Lou to me.

Q. Does Lou Colbert's signature appear thereon?

A. Yes, it does.

Q. Were you present at the time he made that?

A. Yes, I was.

Q. Did he do that of his own free will?

A. Yes, he did.

Q. And for what purpose?

A. Well, the payment of the mortgages, paid them off in different payments.

Mr. McCarrey: We offer that for identification your Honor, a letter dated February, 1947.

The Court: Petitioner's identification number 12. [90]

(Letter dated February, 1947, received and marked Petitioner's Exhibit 12.)

Q. (By Mr. McCarrey): I believe you testified, Mrs. Hayes, that you wrote a number of letters for Mr. Colbert, is that correct?

A. That's correct.

Q. And whom did you write these letters to?

A. To his sister, Emma Colbert.

Q. Anybody else?

A. To the Bureau of Mines.

Appellant's Exhibit A-1—(Continued)

(Testimony of Thelma Gregor Hayes.)

Q. Did you ever receive any of the letters? Did she ever reply?

A. Oh, she wrote. We exchanged letters regularly for years.

Q. Did you ever see any of the letters that she sent back to Mr. Colbert in reply to yours?

A. Yes.

Q. Are you familiar with her handwriting?

A. Yes, I am.

Q. I hand you petitioner's exhibit for identification number 12 and ask if you know what that is?

A. It is a letter from Emma Colbert to Lou Colbert.

Q. And what is the date on that please?

A. That's February 21, 1947.

Q. Did you know Emma Colbert personally?

A. Not personally, only through exchange of letters in many years.

Q. Do you know that to be the letter that you received, that is, in the same handwriting, that you received from this woman known as Emma Colbert?

A. It is in the same handwriting as Emma Colbert's.

Mr. McCarrey: We offer that in evidence, your Honor. Not to get ahead of myself, but I would like to have this in evidence, plaintiff's—or petitioner's identification number 11, a receipt of July 6, 1946.

Mr. Hurley: I object as incompetent, irrelevant and immaterial, no proper foundation laid. It don't

Appellant's Exhibit A-1—(Continued)  
(Testimony of Thelma Gregor Hayes.)  
show that anything was paid for that receipt, how the money was paid or anything about it.

Mr. McCarrey: Very well.

Q. (By Mr. McCarrey): Did you give Mr. Colbert any money for this receipt?

A. Yes, I did.

Q. Do you recall what you gave him, a check or dollar bills? A. No, it was in cash.

Q. And what was the consideration that you gave it to him for?

A. A balance payment of the mortgage.

Q. What mortgage?

A. One of the mortgages, a balance of the last mortgage. [92]

Q. And when was the last mortgage executed upon your premises if you recall?

A. Well, I can't recall that right off without checking the records.

Q. But this is a receipt made in your handwriting but signed by Mr. Colbert, is that correct?

A. That's right.

Q. For a valuable consideration?

A. Yes, it is.

Q. To wit: the sum of \$1,200?

A. \$1,200 and some odd dollars.

Q. Twelve hundred and twenty-four dollars.

Mr. McCarrey: We offer it in evidence, your Honor.

The Court: Be marked Petitioner's Exhibit "K."



Appellant's Exhibit A-1—(Continued)

(Testimony of Thelma Gregor Hayes.)

(Document previously marked Petitioner's Exhibit 11 for identification received in evidence and marked Petitioner's Exhibit "K.")

Mr. McCarrey: May I read that your Honor into the record? "July 6, 1946, received from Thelma Hayes \$1,224 for payment in full with interest on Graehl Circle Bar Mortgage." "\$1,224 paid in full" written in the left hand corner and signed by L. D. Colbert. We offer this in evidence your Honor as Petitioner's Exhibit.

The Court: Petitioner's Exhibit "L." [93]

(Letter dated February 21, 1947, previously marked as Petitioner's Exhibit 12 for identification, received in evidence and marked Petitioner's Exhibit "L.")

Mr. McCarrey: If the Court please, I would like to read only a short paragraph out of this. This is a letter dated 21st day of February, 1947, addressed to "Dear Brother Louis." On the reverse side of the paper, in the last—next to the last paragraph it reads as follows: "I am grateful to Mrs. Hayes for looking after you and want her to know how much I appreciate her efforts. I am pleased to know that she helps you to remember me. Best love to you from me and yours," I can't make it out "sister." Signed, Emma.

Q. (By Mr. McCarrey): Now, calling your attention to the will executed on or about the 22nd day

## Appellant's Exhibit A-1—(Continued)

(Testimony of Thelma Gregor Hayes.)

of October, 1946—may I have that exhibit please, the second will please? I show you Petitioner's Exhibit "C" and—to what purports to be the last will and testament of Louis D. Colbert. I will ask you if you know whether or not you were present at the time of that signing, Mrs. Hayes?

A. Yes, I was.

Q. Where was that signed?

A. It was signed at the hospital.

Q. Now, will you tell the court the circumstances and facts [94] surrounding the execution of this will, if you know, Mrs. Hayes?

A. Well, I visited Lou that afternoon and he said he had had a will made out to me and he had a change made in it and he wanted me to be sure and be there that evening when he signed it.

Q. Did he tell you anything about it?

A. Well, he said it would be to my best interest to be there.

Q. Were you present at the time the will was signed? A. Yes, I was.

Q. Who, if anybody, was present at the time the will was signed?

A. Well, there was James L. Haynes and Arthur A. Benz and V. A. Kobbell.

Q. How do you know they were present?

A. Well, I knew them. They were there and I was there.

Q. Will you relate to the court the circumstances

Appellant's Exhibit A-1—(Continued)

(Testimony of Thelma Gregor Hayes.)

surrounding this—surrounding your going to the hospital at the time that was signed?

A. Well—at the time it was signed?

Q. Yes.

A. Well, we all—I went over that evening at regular visiting hours. I think it was a little late. It was late in the evening. [95]

Q. And just tell what took place if you recall?

A. Well, I just went in to talk to Lou and everybody came in there and he had his papers and signed it and said he wanted to be sure it was witnessed properly and not have things go wrong like Kelly's will.

Q. What happened to Kelly's will?

A. He said he wanted—he said he went to considerable expense and trouble with it and that the money all went to the Territory or something. As a matter of fact, he kept worrying about his will being made out properly and not like Kelly's will.

Q. Do you know what happened in Kelly's will?

A. He was administrator of several estates and he said he didn't want the same mistakes made on his will.

Q. Was there anything special about this will that he referred to about, if you recall?

A. You mean——

Q. Anything special about the execution of it?

A. He wanted to be sure to have 3 signatures on it.

Q. Did he tell you why he wanted 3 signatures?

Appellant's Exhibit A-1—(Continued)  
(Testimony of Thelma Gregor Hayes.)

A. He said that there was only one signature on the will. That was in some case of his that he had before.

Q. Did he discuss with you the fact that he wanted 3 witnesses on it?

A. Yes. He said that wills were—lots of court cases [96] came up over wills and he wanted to be sure his was made out properly.

Q. Who was present when you went to the hospital?      A. In the daytime?

Q. No, at the time the will was signed?

A. Well, that evening, Warren Taylor was there and V. A. Kobbell and Mr. Haynes and Benz.

Q. Now, did you see Mr. Kobbell affix his signature to that will?      A. Yes.

Q. Was anybody forcing him to put his signature to that will?      A. No.

Q. Did anybody force any of the witnesses to put his signature to this will?

A. No, I should say not.

Q. Did they do it of their—free and voluntarily?

A. Yes. They did at Lou's request. He asked them if they would sign.

Q. Did he ask Mr. Haynes to sign that will?

A. Yes.

Q. How do you know that?

A. Well, he asked him. He says, "Come on over here Jimmy. I'd like you to sign this will for me, witness this will."



Appellant's Exhibit A-1—(Continued)

(Testimony of Thelma Gregor Hayes.)

Q. Do you remember what time of the day it was? [97]           A. It was late evening.

Q. Well, would you care to set a time by late evening?

A. Well, it was after dark. It was late evening, as late around visiting, last part of visiting hours.

Q. This is in October. Was it light outside?

A. No, it was dark outside. It seemed like it was dark outside.

Q. Was there any nurses present? Were there any nurses present?

A. Well, one got Lou a glass of water I think.

Q. I will ask you if you know what the condition and state of mind he was in at that time, Mrs. Hayes?

A. He was in a very—it seemed to be very alert state of mind. He knew what he was doing.

Q. Was he depressed?           A. No.

Q. What was his physical condition if you know at that time?

A. He was feeling much better and said he would be home in a couple of days.

Q. How often did you go to visit Mr. Colbert during his stay in the hospital about that time?

A. Oh, every afternoon and nearly every evening.

Q. And did you talk with him frequently?

A. Yes. He always wanted some little things, like a newspaper [98] and magazines and things like that.



Appellant's Exhibit A-1—(Continued)  
(Testimony of Thelma Gregor Hayes.)

Q. Did you get those? A. Yes.

Q. Who paid for them?

A. I paid for them.

Q. Did he ever repay you back for them?

A. Well, after he got out of the hospital. I never mentioned any of those things to him.

Q. Did he ever pay you back for them?

A. Well, no.

Q. I will ask you if you know where Mr. Colbert went after he came out of the hospital?

A. He came over to my place when he came out of the hospital.

Q. At whose request?

A. His own idea. He walked home from the hospital.

Q. And what did he tell you when he got there if anything?

A. He told me he didn't like the way the nurses were, that he would never get well if he stayed over there and would be a lot better off at home.

Q. Why did he say that, if you know?

A. Well, he made claims that he dropped the end of his cigarette and burned the sheets and one of the nurses caused him to get very aggravated with her and he said that he couldn't live there and he felt lot better if he could get home. [99] He had a lot of troubles with the nurses. They bothered him a lot.

Q. Did they give him good service?

Appellant's Exhibit A-1—(Continued)

(Testimony of Thelma Gregor Hayes.)

A. No. He said they gave him very poor service. They didn't seem to care what he wanted or did.

Q. Did he make any reference as to how long he had to wait for water or food?

A. He said he would have to ring and ring and they would tell him they were very busy and he didn't seem to like the food, said they had lot better food at home. He said he wanted to come home and eat and eat what he wanted to eat, and not on a diet.

Q. Was he mentally incompetent at that time to take care of his business in your opinion?

A. I don't think he was a bit incompetent.

Q. Did you see any change between say June or July of 1946 and the time he went to the hospital?

A. Not a bit. It was my suggestion that he went to the hospital or else he wouldn't have went.

Q. Did you see any change in his mental condition between the time he came over to your place after he had been to the hospital and when you received this letter from his sister?

A. No. He was worried about the lies—about the papers they had served on him in the hospital. He was very worried about that. [100]

Q. What was his worry about that? Did he ever tell you?

A. Well, he was just furious about serving incompetent papers on him while he was sick in the hospital.

Q. Were the papers served on him before he went to the hospital?           A. No.

Appellant's Exhibit A-1—(Continued)  
(Testimony of Thelma Gregor Hayes.)

Q. Do you know that of a fact?

A. Yes, sir.

Q. How long were they served on him after you were given that power of attorney if you know?

A. I don't know the exact time. After, it was right after I would say around, I think, it would be about a week or two.

Q. I think the power of attorney states on it the 17th day of October and I think the papers were served on the 26th day of October, is that about right.

A. That would be about right.

Q. Now, when he went over to your place to live after he got out of the hospital, I will ask you whether or not he went way from the hospital with the consent of the hospital and the doctor, if you know?

A. I am not sure. He came home very angry and mad about something that had taken place in the hospital, the way they had acted or something. He said he just absolutely refused to stay there any longer. He wasn't sick like they were claiming he was. He was physically and mentally all right [101] and he didn't want to stay in there.

Q. How was he dressed when he came home from the hospital, if you can——

A. With his bedroom slippers on and overcoat on.

Q. Over what?

A. His night shirt I think it was.

Q. And did he say why he had that clothing on?

A. He said he had asked the nurse for his clothes

Appellant's Exhibit A-1—(Continued)

(Testimony of Thelma Gregor Hayes.)

and wanted to go home and she took his clothes out of the room and refused to let him go home, so he got up and walked home.

Q. Did he say anything about—he had a quarrel with the nurse?

A. Yes. He said he had several arguments, asked to bring him water and things. He was quite angry and he couldn't see any reason to stay.

Q. Did he say anything about having a quarrel or conversation with the sisters over there?

A. No, he never mentioned the sisters, just he had lots of arguments with the nurses.

Q. Now, after he came home, Mrs. Hayes, when I say home back to your place, is that where he came to?

A. He came to my mother's when he came out of the hospital first and then mother called me up and brought him.

Q. And where did you take him?

A. He wanted me to give him a room at the Graehl instead [102] of going to his place until he got well and said he could get well a lot quicker then.

Q. Did you give him a room?           A. Yes.

Q. Will you tell the court what the furnishings were or what condition the room was in?

A. He had a very nice room, one of the nicer rooms we have. It was very well furnished. It had everything in it, a sink, and running water, a toilet and shower.

Q. And did you charge him for that?



Appellant's Exhibit A-1—(Continued)  
(Testimony of Thelma Gregor Hayes.)

A. No.

Q. And did he ever pay you anything for that?

A. No, we have never gotten around to that.

Q. Did you buy anything for him at that time?

A. Yes, he used to get anything he wanted to eat, anything he wanted to order. I used to personally bring him special things that he liked better.

Q. Did you provide sheets for him?

A. Oh, yes.

Q. Did you ever have his hair cut or anything like that?

A. Oh, yes. I used to have a barber come over every week and cut his hair.

Q. Did he have to have his hair cut once a week?

A. We had it cut once a week and he also got a shave.

Q. And who was that barber?

A. I think his name was Sherry. [103]

Q. You remember what it cost you for him to come over?      A. \$10.

Q. Ten dollars at a time?      A. Yes.

Q. Were you able to pay that kind of money at that time?

A. Well, I—it was kind of hard, but I paid it.

Q. Did you provide meals for him all the time he was in the hospital—in your place? Correction.

A. Yes.

Q. And what was his physical condition, if you recall.



Appellant's Exhibit A-1—(Continued)

(Testimony of Thelma Gregor Hayes.)

A. He got well right away after he came home over there. He was walking around, taking walks. He would come up to mother's for dinner to her place and sit around afternoons there. He would come downstairs and visit with friends and had dinners many times and eat upstairs many times. I had it brought upstairs. Sometimes we ate in the apartment and sometimes downstairs.

Q. Did you hear Mr. John Cetkovich testify this morning that he used to take dinner up to his room?

A. Yes.

Q. Is that a fact?

A. Well, when he went first there, John would go up and he asked what he would like and he would try to prepare what he liked to eat when he came from the hospital so that he got well. [104]

Q. Do you recall whether or not Mr. Jack Allman ever came to visit Mr. Colbert?

A. Yes, he did.

Q. How do you know?

A. Well, he came several times. I remember he asked to see Lou. He came down and talked to him a number of times. They sat at a table and ate together. I think they ate together a couple of times.

Q. They act like good friend, did they?

A. Oh, yes.

Q. Do you recall Mr. Taylor testifying this morning that he took Mr. Allman over there?

A. I don't remember whether I was here or not.

Q. You don't recall that?

A. I don't recall.

Appellant's Exhibit A-1—(Continued)  
(Testimony of Thelma Gregor Hayes.)

Mr. McCarry: That's all.

Cross-Examination

By Mr. Hurley:

Q. That receipt, twelve hundred and twenty some odd dollars, where were you when he gave you that?

A. When who gave who what?

Q. That receipt for \$1,200. I say, where were you when Lou Colbert gave it to you?

A. At his house.

Q. Whereabouts? [105]

A. In Gillam Way.

Q. I see. And you gave him \$1,224 in cash?

A. That's right.

Q. And what did he do with the money?

A. I didn't ask him what he did with the money.

Q. I thought you talked over all your business matters?

A. Oh, we did.

Q. Did he carry it around with him and somebody steal it or did he put it in the bank?

A. I believe he made a loan to someone else with part of it.

Q. What?

A. I think he said he made some other loans to people.

Q. Who to?

A. I don't know now. I have a record of names of people he made loans to.

Q. But you don't know what he did with it?

Appellant's Exhibit A-1—(Continued)

(Testimony of Thelma Gregor Hayes.)

A. I didn't ask him at the time I gave it to him.

Q. Did you ask him afterwards?

Mr. McCarrey: Just a moment, your Honor. I would like to have Mr. Counsel give the witness a chance to testify.

Mr. Hurley: I did.

Q. (By Mr. Hurley): Did you ask him afterwards?

A. No, I never asked him exactly what he did with the \$1,200 [106] I gave back. He would always loan small sums to people, one or two, three hundred dollars. He said, "Here Thelma, will you write these down in this book, put it in this note book" is the way he would put it. I would copy them off.

Q. Do you know what become of the book?

A. Yes.

Q. Where is it?                      A. I have the book.

Q. Where?

A. In Anchorage among other things of mine.

Q. What kind of a book is it?

A. Well, it's just a little brown book with empty pages in it.

Q. How big a book was it? What shape?

A. Well, I don't know the exact size of it, just a regular——

Q. Was it longer than it was wide?

A. I don't know that exactly. I say it was longer than it was wide.

Q. But you didn't bring it up here with you?

A. No. And it has a lot of personal things in it.

Appellant's Exhibit A-1—(Continued)  
(Testimony of Thelma Gregor Hayes.)

Q. What became of the will after it was signed by Mr. Colbert over there in the hospital?

A. I think it was put in escrow with Mr. Taylor's office.

Q. Who took it? Did you or Mr. Taylor take it?

A. I imagine Mr. Colbert gave it to Mr. Taylor.

Q. Weren't you there? A. I was there yes.

Q. Yeah, but what became of it after it was signed?

A. Well, I think that Mr. Colbert—I'm not sure—told Mr. Taylor to put it in a safe place where he won't lose it.

Q. When did you see that will again?

A. Well, before—after Lou was dead.

Q. How long after?

A. I would say about a week after.

Q. About a week after?

A. Few days after.

Q. I see. And what was done after you saw it?

A. I guess—I think the lawyer took care of that. I didn't have anything to do with it.

Q. What lawyer? A. Mr. Taylor.

Q. I see. And how long were you here in Fairbanks after Mr. Colbert died?

A. I am not sure.

Q. About how long?

A. Well, I can't say.

Q. Where did you go from Fairbanks?

A. To Anchorage.

Q. You went to Anchorage? A. Yes. [108]



Appellant's Exhibit A-1—(Continued)  
(Testimony of Thelma Gregor Hayes.)

Q. Well, do you remember when Lou Colbert died?

A. Yes.

Q. About when was that?

A. Around the 25th of May, 1947.

Q. And you have no idea when it was that you moved from here to Anchorage?

A. I am not sure. It would be around June or July, somewhere there. I am not sure. I can't say.

Q. Before he died? The same year?

A. No, no. I can't say exactly when I went to Anchorage.

Q. Was it a year after Lou died or less than a year or more?

A. It would be a year after.

Q. About a year after Lou died you left Fairbanks and went to Anchorage?

A. I think it was around there.

Q. Did you know that the bank had applied to be appointed executor under the will that he had made out?

A. They started that the first—the second check I think it was that I took to the bank to cash.

Q. I am talking about after Lou died. Did you know that the bank had filed a will to be appointed administrator or executor?

A. Yes.

Q. What? A. Yes. [109]

Q. After Lou died? A. Yes.

Q. You heard about that before you left here?

A. Yes.

Q. Now, did you present this power of attorney



Appellant's Exhibit A-1—(Continued)  
(Testimony of Thelma Gregor Hayes.)

to the bank, the one that has been admitted in evidence?      A. Yes.

Q. What did you present it to the bank for?

A. I showed it to Mr.—I showed it to Mr. DeWree and they asked me——

Q. Showed it to who?      A. Frank DeWree.

Q. Yes.      A. And to Mr. Stroecker.

Q. And after you showed it to him, did you write some checks on Lou's account?

A. I showed it to Al Visca.

Q. I say, after you showed them, did you write some checks on Lou's account and draw some money out of the bank out of his account?

A. No, no, it was before I showed it to them.

Q. Well, did they cash the checks you signed?

A. They cashed the one check. They cashed two checks I believe.

Q. How much?

A. I can't remember the amount now. [110]

Q. A hundred apiece, weren't they?

A. No, I can't remember the exact amount, what it was.

Q. Didn't you draw three checks for a hundred apiece out of Lou's account?

A. No. I can't remember the exact amount.

Q. You wouldn't say you didn't write three hundred dollar——

A. No, I didn't. I think there were two, I think.

Q. When you came back the last time, they told you that they wouldn't cash any more, is that right?

Appellant's Exhibit A-1—(Continued)

(Testimony of Thelma Gregor Hayes.)

A. No. They said they were starting a suit to represent Lou themselves.

Q. Yes and that——

Mr. McCarrey: Just a moment, please. I want the Court to instruct the attorney to permit the witness to answer and——

Q. (By Mr. Hurley): And they didn't cash any more, is that right?

Mr. McCarrey: Just a moment.

The Court: Mr. Hurley, permit the witness to answer the question.

Witness: I didn't try to cash any more. They told me that they were going to start a suit to act as power of attorney.

Q. (By Mr. Hurley): And didn't they tell you that they wouldn't cash any more checks? [111]

A. Well, I didn't ask to cash any more. When they started——

Q. Will you answer the question? Didn't they tell you that they wouldn't cash any more checks signed by you on his account?

A. No, there was nothing said.

Q. They didn't tell you that?

A. I don't remember what was said. It was quite an argument when I went in there. Lou had also asked me to ask them about that other will that he had in there, to tell them that it was no good any more. He made another will and I asked Frank DeWree about it and Frank told me that there wasn't anything there to his recollection.

Appellant's Exhibit A-1—(Continued)  
(Testimony of Thelma Gregor Hayes.)

Q. Now—— A. So I told Lou that.

Q. Now, getting back to the money. How much money did you draw out of Lou's account?

A. I am not sure.

Mr. Taylor: If the Court please, she's answered this a half a dozen times.

Q. (By Mr. Hurley): Well, that's his money. What became of it?

A. I am not sure how much I spent on Lou or how much I drew out. It went. It's a little amount. Quite a bit spent during the time he was sick and I can't remember the amount. [112]

Q. What amounts had been spent after he went to the hospital prior—that you spent for him prior to the 22nd day of October?

A. Well, lot of small sums.

Q. How much?

A. I can't say because I took him to the hospital——

Mr. McCarrey: If the court please——

Q. (By Mr. Hurley): You took him to the——

Mr. McCarrey: I am going to object to the whole line of testimony. It does not draw the proof of the competency of Mr. Colbert to execute a will and what passed between the bank and this witness has absolutely no bearing on it whatsoever. It's immaterial and irrelevant.

The Court: Objection sustained.

Mr. Hurley: I think that's all.

Appellant's Exhibit A-1—(Continued)

Mr. McCarrey: No re-direct, your Honor. That's all.

(The witness left the stand.)

The Court: Court will recess for 10 minutes.

(A recess of ten minutes was taken.)

Mr. McCarrey: Your Honor, the record isn't too clear on what these exhibits in fact state—are. Would the court please take the time to go over them and put in the record what they are? [113]

The Court: Petitioner's exhibit "A" is probate file 1114, Louis D. Colbert, guardianship. Petitioner's exhibit "B," probate file number 1141, Louis D. Colbert, deceased. It is the matter of the estate of Louis D. Colbert deceased. Petitioner's exhibit "C," probate file number 1145 in the matter of the estate of Louis D. Colbert, deceased. Petitioner's exhibit "D" is the last will and testament of Louis D. Colbert, executed 22nd day of October, 1946. Petitioner's exhibit "E" is the power of attorney executed by Louis D. Colbert, 17th day of October, 1946. Exhibit—Petitioner's exhibit "F" is a list of charges and list of transactions, piece of notebook paper. Petitioner's exhibit "G" is an authorization to allow Thelma Hayes to have access "to my safe deposit box" signed by Louis D. Colbert, witnessed by Kenneth D. Wire and Arthur A. Benz. Petitioner's exhibit "H" is a bank statement from the First National Bank together with checks covering the months of September, 1946, and October, 1946.

Mr. McCarrey: Your Honor, will you note the



Appellant's Exhibit A-1—(Continued)  
number of checks listed on that statement please?

The Court: There are eight checks listed on the statement and there are 10 checks attached to the statement.

Mr. McCarrey: And does it show who signed those checks as the maker? [114]

The Court: Checks are signed by L. D. Colbert.

Mr. McCarrey: Thank you.

The Court: Petitioner's exhibit "I" is a real mortgage executed by Thelma D. Hayes—correction, Thelma D. Gregor in the presence of June Brown and E. B. Collins executed on the first day of December, 1943, being between Thelma D. Gregor, party of the first part and L. D. Colbert, party of the second part. Petitioner's exhibit "J," real estate mortgage executed by Thelma Gregor Hayes witnessed by Grabelle Leigh and Mary McDonnell and executed on the 22nd day of January, 1946, between Thelma Gregor Hayes and L. D. Colbert. Petitioner's exhibit "K" is a receipt dated July 6, 1946, signed by L. D. Colbert and was in payment in full with interest on the Graehl Circle Bar mortgage. The amount \$1224, no cents. Exhibit—Petitioner's exhibit "L" is a letter dated February 21, 1947, addressed to Mr. Louis Dale Colbert, Box 730, Fairbanks and signed Emma. She identifies herself in the letter as sister. Those are all of the exhibits.

Mr. McCarrey: Thank you, your Honor. At this time, I would like to ask permission to—of leave of the Court to call Mr. Taylor back with reference to a direct question. However I can put in rebuttal if



Appellant's Exhibit A-1—(Continued)

the Court desires, but I think at this moment it will be more opportune in light of time. [115]

MR. WARREN A. TAYLOR

previously sworn, resumed the stand and testified as follows:

Direct Examination

By Mr. McCarrey:

Q. Mr. Taylor, I will ask you if you know what became of the will number two which was signed by three witnesses and which is Petitioner's exhibit "D" after it was executed by Mr. Colbert in the presence of those three witnesses on or about the 22nd day of October, 1946?

A. At the request of Mr. Colbert, I took it to my office and placed it in the safe there until the time that I drew up the petition to revoke the letters of administration that had been granted to the bank and letters testamentary to Thelma Hayes.

Q. Do you remember at what time that was?

A. The exact date——

Q. Is in the records?

A. Is in the record. I would have to look at the record.

Q. Did you have a discussion with Mrs. Hayes with reference to the will after that day?

A. After which date do you mean?

Q. After execution of the will, October 22nd?

A. No, until—nothing after Lou Colbert's death.

Mr. McCarrey: That's all.

Appellant's Exhibit A-1—(Continued)  
(Testimony of Mr. Warren A. Taylor.)

Cross-Examination

By Mr. Hurley:

Q. That when she signed the petition, was [116] it?

A. No, the petition was a little bit later than that. I don't know whether I was out of town or——

Q. Little bit later?

A. A little time elapsed. Some time elapsed after his death before we filed the petition.

Q. A little time?           A. Yes.

Q. What is the date on the petition, your Honor?

A. The record will show.

The Court: Mr. McCarrey, you mentioned Exhibit "D." That's——

Mr. McCarrey: I am in error then.

The Court: You were referring then to exhibit "C."

Mr. McCarrey: Yes, your Honor. Thank you for the correction.

Mr. Boggess: Just a moment, your Honor. Isn't Exhibit "C" the second will for which probate is sought here?

The Court: Exhibit "C" is the will which is—the probate of which is sought here.

Mr. Boggess: Exhibit "D" is the will that was executed prior to that will.

Mr. McCarrey: I was referring to Exhibit "C."

The Court: Exhibit "C" is the one that the three witnessed. [117]

Appellant's Exhibit A-1—(Continued)

(Testimony of Mr. Warren A. Taylor.)

Q. (By Mr. Hurley): This petition was filed on the 31st day of July, 1947, by Thelma D. Hayes, is that right?

A. That's about that. If you have the record in there——

Q. And then nothing was ever done with it until the present time?

A. Well, yes, there was something done in it. We petitioned to revoke the letters of administration which had been given to the bank and file an inventory of appraisal as required by law.

Q. That was after it was filed? A. What?

Q. There was a motion made asking them to file an inventory and appraisal?

A. To file an inventory and appraisal, yes.

Q. And the inventory and appraisal was then filed? A. Last fall, last November.

Mr. Hurley: That's all.

Mr. McCarrey: One question, please.

Redirect Examination

By Mr. McCarrey:

Q. But in your petition which was filed by Mrs. Hayes, you ask for revocation of the former letters testamentary didn't you?

Mr. Hurley: That shows for itself. [118]

A. I can explain that. At first I had to draw up a straight petition for letters testamentary under the will, but in the meantime, the bank had applied

Appellant's Exhibit A-1—(Continued)  
(Testimony of Mr. Warren A. Taylor.)

for letters of administration and they were granted and then I later drew up letters to revoke the—petition to revoke the letters of administration and grant them to the person having the prior right under the will.

Mr. McCarrey: Thank you. Petitioner rests at this time, your Honor.

Mr. Hurley: Could we have about a ten minute recess, your Honor? I want to call Doctor Schaible.

Mr. McCarrey: Couldn't we proceed with some other witness?

Mr. Hurley: No, I want to call him first.

The Court: There will be a ten minute recess.

(A ten minute recess was taken.)

Mr. Hurley: We call Doctor Schaible.

#### ARTHUR JOHN SCHAIBLE

called as a witness in behalf of the Defendant, being first duly sworn, testified as follows:

#### Direct Examination

By Mr. Hurley:

Q. Will you state your name, please?

A. Arthur John Schaible. [119]

Q. And what is your profession, doctor?

A. I am a physician and surgeon.

Mr. McCarrey: We will stipulate to his qualifications, Mr. Hurley.



Appellant's Exhibit A-1—(Continued)

(Testimony of Arthur John Schaible.)

Mr. Hurley: As a practicing doctor in Alaska?

Mr. McCarrey: Yes.

Q. (By Mr. Hurley): How long have you been practicing here in Fairbanks, doctor?

A. Since 1941.

Q. And did you practice here—have you had occasion to be called to observe persons who were charged with being insane? A. Yes.

Q. A great many occasions? A. Yes.

Q. And you observed those people for some length of time would you before there would be a hearing in their case? A. Yes.

Q. And you had a great deal of experience of that kind since coming here to Fairbanks, have you not? A. Yes.

Q. Now, were you acquainted with Louis D. Colbert in his lifetime? A. Yes. [120]

Q. How long had you known Mr. Colbert before he came to you for medical attention, if at all?

A. I am not sure, but I think about two or three years.

Q. I see. When did he come to you for medical attention? About what time was it when he came to you first in 1946?

A. Oh, I saw him in—here's a report on 1945, here's another in 1943. I treated him in 1943, July of 1943 and then again in November of 1945 and December of 1945 and then I saw him again October of 1946.

Q. And did he come to your office in 1946?



Appellant's Exhibit A-1—(Continued)  
(Testimony of Arthur John Schaible.)

A. Yes, he——

Q. In the early part of October, was it?

A. Yes.

Q. And did he come there to your office for treatments?      A. Yes.

Mr. McCarrey: Will you please establish the date, as to what date that was in October?

Q. (By Mr. Hurley): Do you know when it was that he first came to your office in October or September of 1946?

A. I saw him on the 8th and 9th of October.

Q. Didn't you see him before that?

A. I probably did, but I don't have a record of it.

Q. You don't have any record of it?

A. No. [121]

Q. What was his condition when you saw him in your office on the 8th of October, 1946?

Mr. McCarrey: Now, I object to that question as not properly stated. Condition of what? In what respect?

Mr. Hurley: Every respect.

Mr. McCarrey: Well, your Honor——

Mr. Taylor: Finance?

Mr. Hurley: No. As to health.

Mr. Taylor: Oh, pardon me.

Witness: He was a man aged and his general health was deteriorating. I had known him previously in 1945 and he was always neat in his habits and when I saw him on the 8th of October, he was very slovenly in his appearance. His bodily proc-

Appellant's Exhibit A-1—(Continued)

(Testimony of Arthur John Schaible.)

esses, his general everything had slowed up. I recall very distinctly that it seemed to take him forever to dress and undress. He was very unsteady. He was very unclean. His underwear was dirty. He wasn't the same. He didn't act the same as he had before. His general health—I saw all the stigma of a generalized arteriosclerosis. That's a hardening of the arteries and it's a disease that comes on with aged people and it affects different people differently.

Q. And what did you do then with him?

A. I recommended—on the 8th I told him to come back the next day as I recall it, and he did come back. He wasn't [122] doing too well and his odor was offensive to the people in the waiting room, so I recommended that he go to the hospital.

Q. Did you arrange for him to go to the hospital at that time on the 9th?

A. Yes, he went to the hospital on the 9th.

Q. Did you call up the hospital about him?

A. I suppose I did. We made the arrangements and he went over to the hospital.

Q. That was on the 9th of September, 1946?

A. Ninth of October.

Q. Ninth of October, 1946?

A. 1946, yes.

Q. And did you see him after that in the hospital in October, after the 9th, when he went over there?

Appellant's Exhibit A-1—(Continued)  
(Testimony of Arthur John Schaible.)

A. Yes, I saw him every day up to the 20th—up to the 20th of November.

Q. And what did you notice in regard to his physical condition? I will ask you first, after he went to the hospital, what was wrong with him there during that time?

A. I found the same. I didn't change my opinion of him. He was a man whose body showed the ravages of a hardening of the arteries. This was manifested by a poorly functioning heart, poorly functioning kidneys, poorly functioning brain.

Q. And how did his bowels and kidneys [123] operate?

A. Well, he had albumen in his urine. He had all the stigmas that you find with hardening of the arteries. The arteries in the kidneys get hard too. There were times when he had no control over his urine. His heart, his brain wasn't too good.

Q. This question of hardening of the arteries. Is that a cause of insanity? A. Yes, it can be.

Q. Now, what was his mental condition after he arrived in the hospital?

A. Well, he was disorientated. His memory was very, very poor. He—his reasoning was affected.

Q. How about hallucinations?

A. Yes, he had those too.

Mr. Taylor: He had what?

Mr. Hurley: Hallucinations.

Q. (By Mr. Hurley): And from your examinations and visits that you made there to the hospital

Appellant's Exhibit A-1—(Continued)

(Testimony of Arthur John Schaible.)

each day during the time he was there, what is your opinion as to his—in regard to the soundness of his mind, whether he was of sound and disposing mind, particularly on the 22nd day of October, 1946?

Mr. McCarrey: I object to that, your Honor. The witness has testified the last time he saw him was on the 20th day of October. [124]

Mr. Hurley: The last time he saw him he said was in November.

The Court: November.

Mr. McCarrey: I beg your pardon. I stand corrected.

Witness: I think mentally he was unsound.

Q. (By Mr. Hurley): You think he was capable of executing a will?

Mr. McCarrey: Now, your Honor, I object to that question as——

Mr. Hurley to Witness: As required——

Mr. McCarrey: Just a moment, please. Let me get the objection in the record here; that counsel here has not properly laid a foundation to answer such a question. How does Doctor Schaible know what the competency of a will is?

The Court: Objection sustained.

Q. (By Mr. Hurley): Doctor Schaible, have you had experience in connection with wills as to what—as to whether or not a man is competent to execute a will or not, whether he is of sound and disposing mind? Do you know what is meant by that term, sound and disposing mind? A. Yes.



Appellant's Exhibit A-1—(Continued)  
(Testimony of Arthur John Schaible.)

Q. And was Mr. Colbert on the 22nd day of October, 1946, [125] of sound and disposing mind?

A. No.

Q. It is your opinion that he was competent to execute a will? A. No.

Q. Was he competent to take care of his business affairs? A. No.

Q. And did you testify in the case in which the First National Bank of Fairbanks, Alaska, had applied for letters of guardianship to take care of the business of Mr. Colbert? A. Yes.

Q. And did you testify at that time that he wasn't competent to take care of his own affairs?

A. Yes.

Q. What is the date—in your opinion, was he competent to take care of his affairs, business affairs of any kind on the 22nd day of October, 1946?

A. No.

Q. You say the cause of his mental trouble is what is commonly known as a hardening of the arteries? A. Yes.

Q. And what is the legal term for this?

A. Arteriosclerosis.

Q. And what was your finding as to his mental condition? What was the term? [126]

A. Well, it is a form of insanity. It is a senile dementia. It is a regression of mental processes and it is classified as one of the forms of insanity.

Mr. Hurley: That's all, you may cross-examine.



Appellant's Exhibit A-1—(Continued)

(Testimony of Arthur John Schaible.)

Cross-Examination

By Mr. McCarrey:

Q. Doctor Schaible, you testified on direct examination I believe that you knew what a requisite was for sound and disposing memory, is that correct? Would you please tell the court what this is, a sound and disposing mind?

A. Well, it would be, should be someone who knows what he wants, who is orientated, someone who knows what time of the day it is, someone who doesn't try to build a fire in the middle of the room. It is someone who has his wits about him.

Q. Well, what do you mean, "wits about him," doctor? Will you please explain?

A. Well, I mean someone who knows what the score is.

Q. Score about what?

A. About his business affairs.

Q. In your opinion then Doctor Schaible, does it mean the same then as managing his business affairs?

A. No, it isn't exactly the same thing.

Q. Well, should it be on a par with being able to manage his business affairs? [127]

A. Will you restate that question again please for me?

(The question was read by the reporter.)

A. I don't think a person who is not of a sound

Appellant's Exhibit A-1—(Continued)  
(Testimony of Arthur John Schaible.)

and disposing mind should—would be able to manage his business affairs.

Q. Will you just answer the question doctor? The question was whether or not a person to be of sound and disposing memory would have to be on the same basis as one who could manage his business affairs?

Mr. Hurley: We object to that.

Mr. McCarrey: Now, your Honor—

Mr. Hurley: Irrelevant and immaterial, not proper cross-examination. There is no provision for anything of that kind either in medicine or in law that I have ever heard of as putting it on the same basis.

Mr. McCarrey: Excepting this, your Honor, Doctor Schaible has put himself on the witness stand here and stated that he knows what a person has to be in order to be of disposing memory. Now, I want to know what—

Mr. Hurley: He didn't say anything about disposing memory.

Mr. McCarrey: Disposing mind.

Mr. Hurley: He said sound and disposing mind is what he testified to.

Mr. McCarrey: I am trying to find out what his answer is about a sound and disposing mind. [128]

Mr. Hurley: Well, ask him.

The Court: Objection overruled.

Mr. McCarrey to Witness: Will you state the answer please?

Appellant's Exhibit A-1—(Continued)

(Testimony of Arthur John Schaible.)

Witness: I still don't understand the question.

Mr. McCarrey: Mr. Reporter, will you please read that last question?

(The question was read by the reporter as follows:

“Will you just answer the question doctor? The question was whether or not a person to be of sound and disposing memory would have to be on the same basis as one who could manage his business affairs”?)

Mr. Hurley: I object to that because that wasn't the question that was asked him, nothing said about sound and disposing memory.

Mr. McCarrey: I will state, your Honor, sound and disposing mind.

Q. (By Mr. McCarrey): And now, I do ask you directly, Doctor Schaible, do you consider a person to be competent who would have to be in order to make a will, he would have to be on the same basis as an individual who could manage his affairs?

A. Yes, I should think so.

Q. Did Mr. Colbert ever talk to you about making a will, Doctor Schaible? [129]

A. No.

Q. Did you know he made a will?

A. No.

Mr. McCarrey: May I have exhibits “C” and “D” respectively?

Q. (By Mr. McCarrey): Now, I ask you Doctor Schaible, if you will take Petitioner's Exhibit “C” and I turn to the last will and testament dated

Appellant's Exhibit A-1—(Continued)  
the 22nd day of October, 1946, signed by L. D. Colbert and would you compare that with the Petitioner's exhibit "D" which is also signed on the same date, and ask after you have had sufficient time to go over them whether or not a person who was incompetent would be able to do and execute and make such a change as therein stated?

Mr. Hurley: We object, if the court please, incompetent, irrelevant and immaterial. It's not stated what he's referring to, nothing to show that any change was made by L. D. Colbert.

Mr. McCarrey: All right then. Your Honor, I will point out to the witness that the first will which is Exhibit "D" has some interlineation and I point specifically to them. It is initialed by Mr. Colbert and then I ask the witness to turn to the same paragraph which is set forth in Exhibit "C" and ask him if a person who was incompetent could reason out such a change? [130]

Mr. Hurley: We object to that if the court please as incompetent, irrelevant and immaterial, not proper cross-examination, no evidence to show that he ever reasoned out any change at all, no evidence to show that he ever wrote on that first will other than to initial it.

Mr. McCarrey: Excepting this, your Honor. I would like to point out that Doctor Schaible has put himself on the witness stand and testified that he is qualified and that also that Lou Colbert was at that time incompetent and this is testing what Doctor



Appellant's Exhibit A-1—(Continued)

(Testimony of Arthur John Schaible.)

Schaible, the witness, knows about such incompetency.

Mr. Hurley: But it is assuming some changes not in evidence, your Honor. There is no evidence that he reasoned out any change at all, that he dictated it or anything else. That is, Doctor Schaible doesn't know that he made the change or anything else. He doesn't know anything about it. He wasn't there. He wasn't asked to be there.

The Court: Objection overruled.

Mr. McCarrey: Go ahead, doctor.

Witness: You're referring to these changes whether a man of sound mind or unsound mind could have made these changes, is that it?

Mr. McCarrey: Yes.

Witness: I am going to look at this change at this thing that he has written in himself. [131]

Mr. Hurley: It is my contention it was never written in. No evidence that it was.

The Court: It was written in by another party and initialed by Colbert.

Mr. McCarrey: But at the request of Colbert.

The Court: Yes.

The Witness: Would you mind reading this for me. This change, this sentence, it doesn't sound,—

Mr. McCarrey: Reading from paragraph two of the Petitioner's exhibit "D" which is the last will and testament of Louis D. Colbert, I read as follows:—

Mr. Hurley: Is that the writing?



Appellant's Exhibit A-1—(Continued)  
(Testimony of Arthur John Schaible.)

Mr. McCarrey: Yes.

Mr. Hurley: That isn't the last one, is it?

Mr. McCarrey: It is the last will and testament, but it is exhibit "D."

The Witness: I just want the written part. That's what you're referring to, that he wrote that in himself?

Mr. McCarrey: It is: "providing certain portions of property be willed if any persons listed by me to Thelma Gregor Hayes at later time" and initialed L.D.C. "Providing certain portions of property be willed to if any persons listed by me to Thelma Gregor Hayes at later time," then initialed by him. [132]

The Witness: That's the part I don't understand. The sentence doesn't make sense. This is the—says here—I am not paying any attention to this other part because I presume that was drawn out by an attorney, but the part that he wrote in himself: "providing certain portions of property be willed to if any persons," that doesn't make sense to me, "listed by me to Thelma Gregor Hayes at later time." "Be willed to if any persons." You have a bunch of prepositions there and I can't understand it.

Q. (By Mr. McCarrey): Well, I am asking you that question regardless of whether you can or not. I am trying—you testified——

A. It doesn't make sense to me.

Q. Now, referring to Petitioner's exhibit "C"—

## Appellant's Exhibit A-1—(Continued)

(Testimony of Arthur John Schaible.)

“D” first and read from it: “I hereby bequeath unto Thelma Gregor Hayes, of Fairbanks, Alaska, all my property, real, personal and mixed, wheresoever situate, and of every kind and nature, of which I may die possessed, or to which I am entitled at the time of my death, to be and become her sole and separate property; provided however, the said Thelma Gregor Hayes shall pay to my sister, Emma Colbert, of Indianapolis, Indiana, the sum of \$25.00 per month so long as my said sister shall live, the same to be paid out of the income or principal of my estate” and then, “providing” further “certain portions of property be willed to if any persons listed by me to [133] Thelma Gregor Hayes at later time” and signed L. D. Colbert. Now, referring to Exhibit “C,” I read the following: “I hereby bequeath unto Thelma Gregor Hayes, of Fairbanks, Alaska, all my property, real, personal and mixed, wheresoever situate, and of every kind and nature, of which I may die possessed, or to which I am entitled at the time of my death, to be and become her sole and separate property; provided however, the said Thelma Gregor Hayes shall pay to my sister Emma Colbert, the sum of One Thousand Dollars; also providing that the said Thelma Gregor Hayes convey certain portions of property now possessed by me to such persons as may be designated by me prior to my passing away.” Is that clear——

Mr. Hurley: We object to that as incompetent,

Appellant's Exhibit A-1—(Continued)  
(Testimony of Arthur John Schaible.)

irrelevant and immaterial, not proper cross-examination, nothing to show that it had been dictated by L. D. Colbert. The evidence shows that Mr. Taylor drew that. We are not questioning counsel's ability to draw a will or not. I don't see why the doctor should pass on that.

Q. (By Mr. McCarrey): Doctor Schaible, I would like to present a hypothetical question to you. If on or about the 17th day of October, 1946—

Mr. Hurley: What date was that?

Mr. McCarrey: 17th day of October, 1946. [134]

Q. (By Mr. McCarrey—Continuing): A person executed a will, executed a power of attorney to an individual; assuming further that on or about the 22nd day of October, 1946, that the same individual called his attorney and asked him to draw a will which his attorney did prepare and then, according to his direction, and then assuming a step further, that this same individual did call his attorney again and have him come back and make a correction to the original will; would a person of that mental status be competent to dispose of his property and to execute any will?

Mr. Hurley: We object to that as incompetent, irrelevant and immaterial.

Mr. McCarrey: It is a hypothetical question.

Mr. Hurley: All the evidence—

Mr. McCarrey: Your Honor, that—

Mr. Hurley: Will you let me finish my objection? The reason that there is nothing in the ques-

Appellant's Exhibit A-1—(Continued)

(Testimony of Arthur John Schaible.)

tion to show that Colbert did anything more than just sign a power of attorney and sign his name to a couple of wills.

Mr. McCarrey: I submit that to the court. There's plenty of evidence that he did many many things than that.

The Court: Objection overruled.

Mr. McCarrey to Witness: Go ahead, please.

Witness: Yes.

Q. (By Mr. McCarrey): What is that answer?

A. This was a hypothetical question and I said "Yes."

Mr. Hurley: What do you mean by that?

Witness: I meant a person who he said a person who desired to make a will on the 15th and called an attorney to make the will according to his instructions and then later signed it and later called him back presumably—someone who did all that I would say he is of presumably of sound and disposing mind, if he did it according to his directions.

Mr. McCarrey: That's all.

Redirect Examination

By Mr. Hurley:

Q. Was Mr. Colbert at that time on the 17th of October and on the 22nd of October, was he of sound and disposing mind? A. No.

Mr. Hurley: That's all.

Mr. McCarrey: Just a moment please.



Appellant's Exhibit A-1—(Continued)  
(Testimony of Arthur John Schaible.)

Recross-Examination

By Mr. McCarrey:

Q. Doctor Schaible, does your record disclose whether or not you saw Lou Colbert on the 17th day of October, 1946? [136] A. Yes.

Q. Does it show that you saw him on the 19th?

A. Yes.

Q. You're sure of that?

Mr. Taylor: If the Court please, let us have the record show what Doctor Schaible is testifying from. What is this?

Witness: This is the hospital record kept by the nurses at St. Joseph's Hospital on Mr. Colbert.

Mr. Taylor: Thanks. We didn't have any record on that.

Witness: And on the 17th it lists the medication he got, who visited him, what sort of day he had.

Q. (By Mr. McCarrey): Does it show that you visited him that day doctor? A. Yes.

Q. Does it show that you visited him on the 19th day? A. No, it doesn't say on the 19th.

Q. Does it show you visited him on the 20th?

A. Yes.

Q. Does it show you visited him on the 25th?

A. 25th?

Q. Yes. A. No.

Q. Then you didn't visit every day up to the 9th day of [137] November, did you doctor?



Appellant's Exhibit A-1—(Continued)

(Testimony of Arthur John Schaible.)

A. Yes, I believe I did. The nurse probably made an ommission.

Q. May I see the records please? A. Yes.

Q. Doctor Schaible, when a man with this senile type of structure to which you referred Mr. Colbert had at this time, have periods when he would be clear and of disposing memory?

A. I think so.

Q. Is it possible? A. It is possible.

Mr. McCarrey: That's all.

Mr. Hurley: Just a minute, Doctor.

Redirect Examination

By Mr. Hurley:

Q. Were you his doctor when he died?

A. I am not positive.

Q. Do you know what he died of?

A. He died of generalized arteriosclerosis, arteriosclerotic heart disease.

Q. (To Mr. McCarrey): Do you have any objections to that record being admitted in evidence?

Mr. McCarrey: I can't see——

Mr. Hurley: Doctor Schaible's?

Mr. McCarrey: It was kept at the hospital.

Mr. Hurley: It was kept under his direction.

Mr. McCarrey: No, I object to that, your Honor.

Mr. Hurley: Then I don't care to offer it.

Mr. Taylor: The doctor has testified from it and

Appellant's Exhibit A-1—(Continued)  
(Testimony of Arthur John Schaible.)

it is in the record. There's no effort made to identify it or place it as an exhibit.

Mr. Hurley: I just asked if there was any objection to it. If you have, I won't offer it. That's all, doctor.

Mr. McCarrey: I would like to ask one more question.

### Recross-Examination

By Mr. McCarrey:

Q. How do you know what Mr. Colbert died of, Doctor Schaible?

A. Because of the general trend of his health and having diagnosed many other cases just like that and knowing his physical condition as of the last day that I recall seeing him. I presume most likely that he died of that same process that had started 10 years previously. Whether I took care of him at his death, I can't recall. I don't even remember whether he died in this hospital or not.

Q. So as a matter of fact, you don't know what he died from, do you doctor?

A. He could have been hit by an automobile. No, I don't.

Q. Yes. You see, he died some 6 months later.

Mr. Hurley: He died what? [139]

Mr. McCarrey: He died some 6 months later.

Q. (By Mr. McCarrey): I think you testified Doctor Schaible that you saw him the last day on the 19th day of November, 1946?

Appellant's Exhibit A-1—(Continued)

(Testimony of Arthur John Schaible.)

A. I saw him last at this visit. I don't know whether I saw him after that or not. I don't recall.

Q. Professionally, that's the last time you recall having seen him?

A. That's what I recall now. The hospital record may show that I took care of him at the last. I don't know.

Q. But it is a fact that you didn't take care of him, isn't it doctor?

A. No, I don't remember. You take care of a lot of people and I don't remember whether—this one is over 4 years ago.

Q. You remember that you were there on the 19th day of November?      A. Yes.

Q. How come you don't know that you took care of him then?

A. I took care of him at that time, yes, but I don't know whether I took care of him in his last illness or not.

Mr. McCarrey: That's all.

Mr. Hurley: That's all doctor.

ANDREW NERLAND

called as a witness in behalf of the Defendant, being first duly sworn, testified as follows: [140]

Direct Examination

By Mr. Hurley:

Q. Will you state your name please?

A. Andrew Nerland.

Appellant's Exhibit A-1—(Continued)  
(Testimony of Andrew Nerland.)

Q. And what business are you engaged in?

A. In the business across the street there, paint and furniture.

Q. How long have you lived in Fairbanks, Alaska.      A. Forty-six years.

Q. Were you acquainted with Lou Colbert?

A. I was.

Q. How long had you known Mr. Colbert before he died?      A. Oh, good many years.

Q. About how many?

A. Oh, I think I must have met him quite a while, probably around in the 30's.

Q. And were you well acquainted with him?

A. Yes, I was.

Q. And did you and he belong to any organizations?      A. Yes, I did.

Q. What were you and he members of?

A. Pioneers of Alaska.

Q. And do you remember when Lou became sick and went to the hospital in October, 1946?

A. Yes. [141]

Q. And did you have any occasion while he was in the hospital to go over and see him?

A. Yes.

Q. Why did you go over to see him?

A. Well, because he had been reported sick through the Pioneer meetings. Some of the members had been there to see him.

Q. And how long after you heard he was sick

Appellant's Exhibit A-1—(Continued)

(Testimony of Andrew Nerland.)

in the hospital was it that you went over to see him? About how long after he went there was it?

A. Well, it might have been quite a little while, but anyway I was told by some of the boys.

Mr. McCarrey: I object to what he had been told.

Witness: I am just going to say how it happened that I went to see him. All right? I went to the hospital to see him. I knew he was sick. I didn't know but I was told that he was sick.

Q. (By Mr. Hurley): Was that two or three weeks after he had gone to the hospital?

A. Well, I don't remember exactly.

Q. You don't remember exactly?

A. No, I don't. Could have been that long at least.

Q. You don't remember about when that was that you went [142] over there? That was——

A. In the fall. It was in the fall of the year. In October I guess, along about there.

Q. How many times did you go over, Mr. Nerland?

A. Well, I went over to see him twice. It was—I went over to see him one time and if I am not mistaken about that, I went there for a short time. That was quite a while before this. He had been there, over there, and whether he had gone out in between times, I kind of think he did. I went to see him one time quite a while before and talked with him. We made a little sick visit to him.



Appellant's Exhibit A-1—(Continued)  
(Testimony of Andrew Nerland.)

Q. When you went to see him in October, did you see and visit and talk to him?

A. In the room and talked to him, yes.

Q. What was his condition there mentally when you talked to him?

A. Well, I came in there and understood that he had been sleeping. But I came in there and I said, "Hello, Lou" and he says, "Hello Andrew." I says, "How are you?" He says, "Oh, I am pretty good now." I says, "Yeah, well, that's fine." "You know," he says, "I got to get out of here. I got an awful lot of work to do, all this work between McGrath and here." He says "Got to be looking after a lot of work and I got to get out of here." Well, anyway, I told him you better stay until you get a little better, [143] something like that, and so it was just about finished on my visit.

Q. Well, did you have any other conversation with him at any other time?

A. No, that was the last time I saw him.

Q. Did you have a conversation with him before that?

A. Oh, the other time?

Q. Any other time.

A. Yeah, I was there that time, but it seems like that was quite a while before.

Q. What impression did you get from talking—

A. You mean the first time I was there to see him?

Appellant's Exhibit A-1—(Continued)

(Testimony of Andrew Nerland.)

Q. What impression did you get from talking to him?

Mr. McCarrey: Well, wait a minute. I would like to have the time established.

Q. (By Mr. Hurley): When did you see him there in October?

Mr. McCarrey: Well, now, your Honor, I submit that the witness hasn't testified that he had seen him in October, for certain.

Witness: Yes, I said—I certainly did. I am certainly sure I saw him in October.

Mr. McCarrey: What year was that?

Witness: In 1906,—in 1946 I believe.

Mr. McCarrey: Was this the first time or the second time you went over? [144]

Witness: I saw him a short time before that, but it certainly was quite a while, probably during the same summer before October.

Mr. McCarrey: Did he die while he was in the hospital that time?

Witness: He died shortly after I had been over this time, this last time, yes.

Q. (By Mr. Hurley): Well, now, he died—when was it he died?

Mr. Taylor: May 17th.

Witness: May?

Mr. Hurley: May.

Q. (By Mr. Hurley): Was that—that was shortly before May, 1947. Was it then that you saw him the last time?

Appellant's Exhibit A-1—(Continued)  
(Testimony of Andrew Nerland.)

A. No, I don't think so. I don't keep track on the dates but I thought it was in the fall of the year.

Q. It wasn't—he died in May according to what they have testified to.

A. I wouldn't know the date he died either.

Q. What was his condition the first time you saw him?

A. Well, his condition was better then than it was the last time I saw him.

Q. What impression did you get as to his mentality, as to his mind? [145]

A. He certainly changed. I didn't believe he was quite rational the first time I was over there. My impression the last time I was over there was certainly different.

Mr. Hurley: That's all.

#### Cross-Examination

By Mr. Taylor:

Q. Mr. Nerland, just for the purpose of clarifying your testimony, the testimony of the witnesses show that Mr. Colbert first time was in the hospital in October of 1946.

A. Uh-huh.

Q. And he stayed there for some time and then went out and later on came into the hospital sometime in the early part of May and when he got out, when he was left there that time, he was taken out dead. He died. So, you went to see him one time when he first went in there and then you went in again to see him during the period——

Appellant's Exhibit A-1—(Continued)

(Testimony of Andrew Nerland.)

A. I could be mistaken on the dates. I didn't keep any dates.

Mr. Taylor: Just to clarify it in your own mind as to what times he was in there.

Mr. McCarrey: Just a moment, please. That's all.

Mr. Hurley: That's all.

MIKE STEPOVICH

called as a witness in behalf of the Defendant, being first duly sworn, testified as follows: [146]

Direct Examination

By Mr. Hurley:

Q. What is your name?

A. Mike Stepovich, Jr.

Q. And where do you live?

A. I live in Fairbanks, Alaska, 103 Charles Street.

Q. How long have you lived in Fairbanks?

A. I was born in Fairbanks and all together, about the last 15 years, last 14 years straight through.

Q. Were you acquainted with Lou Colbert?

A. Yes, I knew him.

Q. How long had you known him before he died?

A. About 13, fourteen years.

Q. Were you here in Fairbanks in October, 1946?

A. Yes, I was.

Q. When did you come here?



Appellant's Exhibit A-1—(Continued)  
(Testimony of Mike Stepovich.)

A. I came here around October the 10th. I stayed here about two weeks or about 10 days.

Q. And during that time after between the 10th and the 20th of October, did you see Lou Colbert in 1946?      A. Yes, I did.

Q. Where did you see him?

A. At the St. Joseph's Hospital.

Q. How did you happen to go over there?

A. Before I left to come up here, we had some business [147] for the estate is the reason I came up and my mother told me to be sure to look up Lou Colbert because the family had moved down there. Lou and my dad were great friends for years, and I went over to see him.

Q. Did you talk to him?      A. I did.

Q. What was his mental condition when you saw him there between the 10th and the 20th of October, 1946?

A. When I first started talking to him, he asked me how the family was. I said "Fine" and all of a sudden, he says, he knew we were down there in California, he says, "I think I'll put on my shoes and walk down to California with you" and then he would ask me again about the family and then he would—another statement he made to me was that if "I wasn't so far from town and out in the creeks, I would put on my clothes and go into town" and then I talked to him a little more and then I left.

Q. And from your conversation with him, would you say that he was sane or insane?



Appellant's Exhibit A-1—(Continued)

(Testimony of Mike Stepovich.)

A. My conversation is—my opinion is that he was insane at that time.

Q. And approximately what time would you say that was? Was that a few days after you arrived here that you went over?

A. I would say it was around the 13th or 14th. I don't [148] exactly know the date.

Q. Of September—or October, 1946?

A. 1946 in October, yes.

Mr. Hurley: That's all.

Cross-Examination

By Mr. Taylor:

Q. Did you ever go back and see him again, Mike? A. Never did.

Q. And you hadn't been there before?

A. No, I hadn't been there before.

Q. Did you know the nature of his ailment, why he was in the hospital? A. I did not.

Q. And you didn't know whether he had been under opiates or sedatives of some sort when you were talking to him? A. I did not know it.

Q. Did he know you when you first came in?

A. When I first came in he did.

Q. And he knew about your family?

A. He talked about my family.

Q. He asked about your family? A. Yes.

Q. And I believe your father and Mr. Colbert were interested in some claims on some of the creeks

Appellant's Exhibit A-1—(Continued)  
(Testimony of Mike Stepovich.)

around here together. Did they have joint interests in some claims? [149]

A. I believe they did up in Gilmore. I'm not sure.

Q. And at the time you went over, did you go over to have Mr. Colbert sign any papers, Mike?

A. No papers. I just went over to see him.

Q. As a friend of the family?

A. That's right.

Q. And when you were talking to him and mentioned the family, is it possible that when he said that he felt like getting up and putting on his shoes and going to see the family, it might be in a joking manner?

A. My personal opinion, it wasn't. It wasn't in a joking manner. That's my own opinion.

Q. Would you say he was having hallucinations?

A. His speech—as I say, he talked alright for about a minute and then he would go off on something and then come back and then go off again.

Q. But you don't know what his condition was on the 22nd day of October?

A. I do not know.

Q. Or the 21st of October?

A. No, I don't.

Mr. Taylor: That's all.

Mr. Hurley: That's all.

Appellant's Exhibit A-1—(Continued)

FRANK DeWREE

called as a witness in behalf of the Defendant, being first duly sworn, testified as follows: [150]

Direct Examination

By Mr. Hurley:

Q. What is your name?

A. Frank P. DeWree.

Q. How long—where do you live?

A. Fairbanks, Alaska.

Q. How long have you been here?

A. In the city since 1919.

Q. Were you acquainted with Lou Colbert in his lifetime?

A. Yes, sir.

Q. And where do you work?

A. At the First National Bank.

Q. And what position do you hold there in regard to probating of estates and guardianship matters?

A. I am trust officer.

Q. And are you acquainted with Thelma Gregor Hayes?

A. I am.

Q. Did Lou Colbert bank with your bank?

A. He did, yes.

Q. And carried it there for a long time?

A. Yes, he did.

Q. Have you any record of the money that he had in there and deposited in there in July, August, September, along in there, 1946 and the checks that were written on his account? [151]

A. I have a record of that from June, 1946, on

Appellant's Exhibit A-1—(Continued)  
(Testimony of Frank DeWree.)

the balance showing the balance at the end of 1946 and some of the checks, not all of the checks. There is a record of the checks that were charged, but we don't have all the checks. Some of the checks have been delivered.

Q. From the record, can you state how much money was deposited during the months of June and July, 1946?

A. Yes, it will show on the records.

Q. How much was deposited in his account in June?

A. Not for June. I can give it to you for July.

Q. How much on the first of July, 1946?

A. The balance in his account as of June 27, 1946, was \$388.56.

Q. How much was deposited in July?

A. \$75. Like deposit in August, \$75.

Q. Have you got any record of the checks that were drawn against—have you got checks that were drawn against his account in October, 1946?

A. Yes. I have the one statement for the period of October 15, 1946, up to until the final closing of the account.

Q. Let me see that. I hand you this statement and these checks and ask you to state what those are?

A. Well, this is a record of his account from October 15th until October 31st, showing a balance as of October 15th of \$411.97 and at the end of October had been reduced [152] to \$54.80.

Appellant's Exhibit A-1—(Continued)

(Testimony of Frank DeWree.)

Q. Are those the checks that were drawn against his account?

A. Checks drawn and charged up.

Q. How many checks during that period?

A. During that period, five checks.

Mr. Hurley: I offer these 5 checks and the statement in evidence as one exhibit.

Mr. Taylor: We object, your Honor. It has no bearing upon the issues in this case. It doesn't tend to prove or disprove the sanity of the testator, Louis D. Colbert.

Mr. Hurley: They are not offered entirely for the purpose of showing his sanity. It is offered to show what was sworn to by Thelma Gregor, to contradict the testimony of her testimony that was admitted in evidence.

Mr. Taylor: I—also introduced in evidence was a power of attorney from Mr. Colbert to her to execute those checks, your Honor. They just clutter the record putting a bunch of——

Mr. Hurley: That power of attorney was introduced.

Mr. Taylor: It shows, the power of attorney shows what was to be done in regard to his business, that he delegated somebody to take care of it while he was sick. This is—— [153]

Mr. Hurley: Your Honor, it shows——

Mr. Taylor: It has no bearing upon the issue. She said she didn't remember how many checks——

Mr. Hurley: It shows that she was drawing his



Appellant's Exhibit A-1—(Continued)  
(Testimony of Frank DeWree.)

money out and why that application was made.

The Court: Objection overruled.

Mr. Hurley: I ask that those be marked as Defendant's Exhibit one.

Q. (By Mr. Hurley): Now, Mr. DeWree, when these checks began to come in, did you make any investigation in regard to Mr. Colbert's condition? Did you make any inquiry?

A. Well, we started looking into it and we heard that he wasn't too well.

Q. Did you talk to Doctor Schaible about his condition? A. I believe I did.

Q. Did you talk to me about it?

A. Yes, sir.

Q. And did you file a petition on the 23rd day of October, 1946, asking the bank be appointed guardian? A. I did.

Q. Did you ever visit Lou over there yourself?

A. No, I didn't.

Q. You didn't see him yourself?

A. No, sir. [154]

Q. But you did file a petition on account of what you found out about his condition?

A. We did.

Q. And you were appointed—the bank was appointed as guardian of his property and person?

A. Yes, sir.

Q. As shown by the files? A. Yes, sir.

Mr. Hurley: I think that's all.

Appellant's Exhibit A-1—(Continued)

(Testimony of Frank DeWree.)

Cross-Examination

By Mr. Taylor:

Q. Mr. DeWree, did you testify that you went and filed a petition without knowing what the mental condition of Mr. Colbert was?

A. Well, I think we spoke to the doctor. The doctor brought it to our attention that his condition was not very satisfactory and I believe another person, Charlie Lingrin.

Q. A doctor, was he?

A. No, just a friend who had been visiting.

Q. Because a person was sick and might have temporary hallucinations, would that necessarily denote that he was insane and would have to have a guardian appointed?

A. That would be up to the Court to decide, I believe.

Q. And then on hearsay evidence, you filed a complaint [155] charging Mr. Colbert with being an insane person?

Mr. Hurley: No, he did not.

Witness: No, I didn't say that.

Q. (By Mr. Taylor): You filed a petition for an appointment of guardian.

A. Yeah, we agreed that he required a guardian. If he needed someone to take care of his bank business, we figured he should have a guardian appointed.

Appellant's Exhibit A-1—(Continued)  
(Testimony of Frank DeWree.)

Q. But you had no personal knowledge yourself except what you heard, is that right?

A. Yes, I didn't see anything.

Q. Would you want somebody to act towards you if you were in the same condition as you acted towards Mr. DeWree—towards Mr. Colbert?

A. I believe I left somebody else to look after—I think my other parties in my family would, but he didn't have any other members of his family.

Q. You're just a banker looking after his affairs? A. Pardon?

Q. You were just a banker then looking after his affairs?

A. Yeah, I believe the condition of his checking account, the way the money was going out, we figured——

Q. When you were appointed guardian, were you appointed the guardian of his person also?

A. I believe everything. [156]

Mr. Hurley: The evidence shows as to how the appointment was made.

Witness: I don't know without looking in the file.

Mr. Hurley: The record is in evidence.

Q. (By Mr. Taylor): Do you know whether or not you were the guardian of his estate and person? Do you know—did you, Mr. DeWree in any way interest yourself in his physical welfare after you were appointed his guardian?

Appellant's Exhibit A-1—(Continued)

(Testimony of Frank DeWree.)

A. We couldn't see him to get near him. We couldn't get him out of Thelma Gregor's clutches.

Q. Did you pay for his board any place?

A. No, sir.

Q. Or see that he was well taken care of?

A. No, sir.

Q. Did you go and see him when somebody else was taking care of him?

A. We heard that somebody else was, yes.

Q. While you were—did you go and see him while somebody else was taking care of him?

A. I didn't visit.

Q. Did you know that Thelma Gregor was taking care of Mr. Colbert?

A. That's what we heard. [157]

Q. Feeding him and giving him a place to sleep?

A. He had his own home.

Q. What?           A. He had his own place.

Q. Well, he had his own place? He was incompetent! Would you allow an incompetent—him as an incompetent to go and live alone at his home up on Gillam Way? You, being his guardian, would you allow him to go up and live alone?

A. Isn't it all subsequent to this?

Q. That was all after you were appointed guardian. In other words you were his guardian of his estate and person, but it devolved upon somebody else to take care of Mr. Colbert, didn't it?

A. We didn't take any part in the administration. She just held right on, wouldn't let go of him,

Appellant's Exhibit A-1—(Continued)  
(Testimony of Frank DeWree.)

wouldn't deliver the keys to the house or nothing; wouldn't surrender anything.

Q. Well, how many times did you see Mr. Colbert after you were—the bank was appointed guardian of his estate? A. I forget.

Q. As trust officer of the bank, you looked after those particular affairs, do you not?

A. Gee, I don't remember now.

Q. Did you go over to Thelma Gregor's to see Lou at any time? A. No. [158]

Q. And after he went back to the hospital the second time, did you go over there?

A. The second time? When was that?

Q. He got out of the hospital and went back. The time he died. Did you go see him then?

A. No, I didn't see him.

Q. Were you collecting the rentals from Lou's houses at that time? A. No, we weren't.

Q. You received no money?

A. I understood that she had made a lease with someone.

Q. While you were—the bank was acting guardian of the estate and person of Lou Colbert, did you collect any monies for his account, for his account?

A. I would have to look at our record now. I couldn't say how much.

Q. Well, now——

Mr. McCarrey: I can't hear the witness, your Honor.



Appellant's Exhibit A-1—(Continued)

(Testimony of Frank DeWree.)

The Court: Beg pardon?

Witness: I don't believe we collected anything during the guardianship, very small amount.

Q. (By Mr. Taylor): Well, now what services did you, did the bank render then as guardian of the estate of Lou Colbert? What did you [159] do? You didn't look after his personal welfare. You didn't look after any of the property.

A. She had it all tied up.

Q. What?

A. She had it all tied up already.

Q. But the important point is that you were the guardian. It was your duty to untangle it or untie it if necessary.

A. Well, I think the account of the report of the guardianship would show that.

Mr. McCarrey: Your Honor, I can't hear the witness. Would you please ask him to take the mike?

The Court: Take the microphone.

Witness: The report of the guardianship would probably show that.

Q. (By Mr. Taylor): Well, who gave the information from which the report of the guardian was filed? You are the trust officer. Did you give the information?

A. The information was furnished to the attorney for making up the report.

Q. Are you positive that you did not collect

Appellant's Exhibit A-1—(Continued)  
(Testimony of Frank DeWree.)

any rents on the account of the guardianship of Lou Colbert?

A. I am not positive. I have to refer to the records when we started collecting rents.

Q. It is possible that somebody might have paid some rents?

A. I don't believe it was, but I can't say for sure. [160]

Mr. Taylor: That's all.

### Redirect Examination

By Mr. Hurley:

Q. There wasn't any money in the estate at the time the bank was guardian, was there?

A. No. We had to put up some fees ourselves.

Mr. McCarrey: At the time the bank was started?

Mr. Hurley: Yes.

Mr. McCarrey: What bank was started?

Mr. Hurley: Only one bank was guardian that I know of.

Mr. McCarrey: Sorry, I misunderstood you.

Q. (By Mr. Hurley): And when was the—you knew about the mortgages that Lou held against the—mortgage and the judgment against Thelma Gregor? A. Yes.

Q. That was foreclosed? A. Yes.

Q. That wasn't finished until after the bank was appointed administrator, was it?

Appellant's Exhibit A-1—(Continued)

(Testimony of Frank DeWree.)

A. That's right.

Q. And the first money that came into the estate was that money which was paid after the building was sold and the mortgage foreclosed against Thelma Gregor, is that right? [161]

A. We received money from that and we received some rents from some cabins on Gillam Way. I forget just when that was. I think it was during the administration of the estate though.

Q. The principal property of the estate was money that was recovered on the judgments that he got on his mortgages against the property of Thelma Gregor, isn't that right?

A. Yes, that's right.

Mr. Hurley: That's all.

Mr. McCarrey: Your Honor, may I ask him a question?

Recross-Examination

By Mr. McCarrey:

Q. Mr. DeWree, you just testified on redirect examination that you collected some money on a mortgage that Mr. Colbert had. How much was that?

A. We collected the money on the foreclosure of a judgment and then on the fire insurance we collected some.

Q. How much was that?

A. I haven't the records with me here. Approximately?

Appellant's Exhibit A-1—(Continued)  
(Testimony of Frank DeWree.)

Q. Yes. A. Around nine thousand.

Q. Around \$9,000? A. Yes, sir.

Q. Is that cash? [162] A. Yes, sir.

Q. Where is that cash? At the present time?

A. On deposit in the trust fund.

Q. At which bank? A. First National.

Mr. McCarrey: I would like to ask one question on prior direct examination if I may. The witness testified that he had his checking account in the First National Bank. May I do so, your Honor?

Q. (By Mr. McCarrey): Did Mr. Colbert have all his money in the First National Bank?

A. I wouldn't know.

Q. As his guardian, you didn't check to see if he had money elsewhere then?

A. No, we never did.

Q. Did you? You ought to know. You're the guardian.

A. Took it for granted it was in our bank all the time. We never saw any place—any other place.

Q. So, you didn't check on the other bank?

A. Not that I remember. I don't believe I did.

Q. And did you check to see if he had money anywhere else besides the other bank?

A. No, we found nothing to intimate that he did.

Q. But you didn't check further did you, Mr. DeWree? [163]

A. There was nothing to check on.

Q. But did you or did you not check further?

Mr. Hurley: Check with who?

Appellant's Exhibit A-1—(Continued)  
(Testimony of Frank DeWree.)

Mr. McCarrey: With anybody to see if he had any more money elsewhere.

Witness: You will have to see some corroborating evidence to give a reason to check further.

Q. (By Mr. McCarrey): But did you?

A. Didn't find nothing.

Q. Well, you didn't, did you?

A. Didn't find nothing to check.

Mr. McCarrey: That's all.

Mr. Taylor: That's all.

Mr. Hurley: That's all. I will call Mr. Stroeker.

The Court: Mr. Hurley, this exhibit that you offered into evidence has been marked Defendant's exhibit "A"—Defendant's exhibit 1. It will be marked Defendant's Exhibit 1.

(Bank statement and 5 checks were received in evidence and marked Defendant's Exhibit 1.)

## EDWARD H. STROEKER

called as a witness in behalf of the Defendant, being first duly sworn, testified as follows: [164]

### Direct Examination

By Mr. Hurley:

Q. What is your name?

A. Edward H. Stroeker.

Q. How long have you lived here in Fairbanks,

Mr. Stroeker? A. Since 1904.



Appellant's Exhibit A-1—(Continued)  
(Testimony of Edward H. Stroeker.)

Q. And you have been connected with the First National Bank—— A. 32 years.

Q. For 32 years. And you're president now are you not? A. What?

Q. You're president of the bank now?

A. Yes.

Q. Were you acquainted with Louis D. Colbert in his lifetime? A. Very well.

Q. How long had you known Lou before he died?

A. Oh, I knew him many years when he was on the creeks and hard rock mining and other mining. I couldn't say off hand. Probably 20, 30 years.

Q. At least that long? A. Yes.

Q. Were you—you remember when he became ill in October of 1946?

A. Well, I knew that he was ill in the fall of the year 1946. I don't know exactly what time, but I know that he was quite ill as a man that wasn't in his right mind. [165]

Q. Were you——

Mr. Taylor: Just a moment. We are going to object; that the answer be stricken as not responsive to the question and calls for a conclusion of the witness.

The Court: Objection sustained.

Mr. Taylor: Proper foundation has not been laid for an answer——

The Court: Objection sustained.

Appellant's Exhibit A-1—(Continued)

(Testimony of Edward H. Stroeker.)

Witness: I would say that he was not in his proper mind.

Mr. Taylor: Just a moment. There's no question. I move that there's been—has been no question propounded to the witness.

The Court: Objection sustained.

Q. (By Mr. Hurley): Just a minute, Mr. Stroeker. Do you remember when Lou went to the hospital that fall in 1946?

A. Yes, it was in the fall of 1946. I remember that very well.

Q. You remember that he went over there?

A. Yeah.

Q. You heard about him being there?

A. Yeah.

Q. Now, did you see him in the hospital while he was over there? A. No. [166]

Q. Did you see him a short time before he went to the hospital?

A. I had seen him a short time before he went to the hospital.

Q. And where did you see him?

A. I saw him right in the bank at my—he was at my desk.

Q. And what was the occasion of him coming there at that time? How did you happen to see him? Just tell what transpired between you and him up at the bank at that time.

A. Well, I don't quite recall all of our conversation. That's quite a ways back, but I know I had

## Appellant's Exhibit A-1—(Continued)

(Testimony of Edward H. Stroeker.)

talked with him about his mortgages and things relative to real and chattel mortgages and insurance and things of that kind and he didn't seem to understand anything at all about it and he said, "My attorney knows." I said, "Lou, that has nothing to do with it. You should know yourself. Do you know what to do with a chattel mortgage when it becomes due and how long it takes a chattel mortgage to become due and what you should do for the renewing of it"? And I went over many of those things with him and to be sure that he had his insurance and the insurance was made so that he would benefit through any loss that there may be. I took up many things with him, but he didn't seem to grasp those things at all. He said, "Well, my lawyer knows all those things."

Q. Had you known Lou years before that?

A. What? [167]

Q. You knew Lou Colbert years before that, did you not?           A. Yes.

Q. What was his condition then as to knowing about things?

A. Well, Lou seemed to know all right. He made loans and he seemed to make out all right.

Q. Did he seem to be a pretty bright man?

A. Yes. He wasn't a weak man. He was a fairly bright man.

Q. Did you notice a difference when you saw him at the bank that time before he went to the hospital and what he had been before that?

Appellant's Exhibit A-1—(Continued)

(Testimony of Edward H. Stroeker.)

A. Oh, I noticed that as soon as he come in. The look on his face and the eyes and the way he wore his hat. It was just cross-wise on his head and so on. I thought, "My God, what has happened to poor old Lou"? I had heard different rumors, but those I presume are not permissible, but I did hear rumors about him and then I was quite convinced when I saw the man and talked with him and he didn't talk rational to me at all and his dress and everything was absolutely contrary to the way he did dress himself up otherwise.

Mr. Hurley: That's all. You may cross-examine.

Cross-Examination

By Mr. Taylor:

Q. Mr. Stroeker, about when was that conversation with Mr. Colbert? [168]

A. Oh, it was sometime I think in the fall of 1906 or thereabouts. I don't recall just exactly when it was. You know it is a long time and one can't remember from day to day and recall exactly the following day what has taken place today. I have always made an allowance for that with myself. I couldn't say absolutely that such and such a thing had taken place because I know well enough that someday you talk to people and the next day you can't say absolutely what your conversation was.

Q. That same reasoning might hold in the case



Appellant's Exhibit A-1—(Continued)  
(Testimony of Edward H. Stroeker.)  
of Lou saying he had nothing to do with the chattel and real mortgages.

A. Well, I took that up with him and I explained thoroughly to him, but he didn't seem to understand that at all. He said "Well, that was up to my attorney to worry about that."

Q. Doesn't that show an intelligence on his part?

A. No.

Q. When he leaves it up to his attorney?

A. No, not in my mind.

Q. (Laughter.)

A. That's why—I may have an instrument drawn up by you but unless I look over that instrument myself and know what the contents of it are, why, I don't know what to do with it. Supposing that you give a man a mortgage——

Q. Yeah. [169]

A. And it is a chattel and you don't explain to him when that chattel is due and when the real is due——

Q. Yeah.

A. And looking after the insurance to see if there is insurance and that he seemed—he didn't seem to know anything about it.

Q. Well now, from that, the average layman would possibly be declared incompetent because isn't it a fact that the average layman don't know anything, little, if anything about—— (Interrupted.)

A. Oh, no, he was too bright a man himself.



Appellant's Exhibit A-1—(Continued)

(Testimony of Edward H. Stroeker.)

He had known what he was doing. Mr. Colbert was no fool. When he was in his right mind he was a man of good intelligence. He wouldn't have been able to put over deals such deals as he had on the quartz claims and so on that he had unless he was a man of some intelligence. He had to know something about his business and he come from a good intelligent family.

Q. What is the present law, Mr. Stroeker, in regard to renewing chattel mortgages?

A. What is the present what?

Q. What is the present law in regard to——

A. Well, you have one year after the cancellation—one year after the due date of the chattel to renew, to take that over.

Q. The layman can do that all right. The layman that owns [170] the mortgage, he can do that.

A. Well, he would take that to his attorney and have him fix that up for him, to look after the renewal of it.

Q. That was what Lou was doing, leaving that to his attorney.

A. The attorneys don't look after that. After they make their mortgages out, they're through with that. They don't file that and look after your business for nothing afterwards. If I have you make out a mortgage, a renewal and insurance, you pay no more attention. You get your fee when it is made out and that's ended right there. You have

## Appellant's Exhibit A-1—(Continued)

(Testimony of Edward H. Stroeker.)

gotten your fee so I have to take—to use my own judgment thereafter.

Q. Do you know whether or not Mr. Colbert ever renewed any of his chattel mortgages?

A. Well, that wasn't up to me to——

Q. Whether Mr. Colbert did or not?

A. What?

Q. Whether Mr. Colbert renewed the chattel mortgage?

A. No. That wasn't up to me to look after——

Q. No, I would not think so. Do you know whether or not Mr. Colbert renewed any chattel mortgages as he was required by law?

A. Well, that doesn't come under my—that's his personal affairs. That isn't my affair. Just as I say, when you get your fee, you're through with the man and he looks after his [171] own affairs until he comes to you again and which he will have to pay you another fee for looking after his affairs and he didn't come to me—I look after my own and he looks after his own and if he is making loans outside of the bank, it isn't up to the banker to turn around and look after another man's affairs for him.

Q. Did you and Mr. Colbert have any quarrel at the time you had the conversation?

A. Oh, no. I never quarreled with Lou at all. Never had any occasion to quarrel with him. I very seldom quarrel with anyone at all. That isn't part of my business to quarrel with people. I think one must use a little diplomacy when they're in business.

Appellant's Exhibit A-1—(Continued)

(Testimony of Edward H. Stroeker.)

Q. Mr. Stroeker, at that time, did Mr. Colbert ask to get the will that he had left with the bank?

A. No, he didn't take that up with me. Had he done so, I would have referred him to the trust officer. That does not come under my department at all. That's what my trust officer is paid for to look after those things and I don't interfere with his business unless he comes to me or unless I think he is doing something that is not quite right. Otherwise, he uses his judgment. That's what he is paid for, for the knowledge he has in handling trust accounts and so on.

Mr. Taylor: Yeah. That's all.

Mr. Hurley: That's all, Mr. Stroeker. I [172] would like to be sworn, your Honor.

MR. JULIAN A. HURLEY

being first duly sworn, testified as follows in behalf of the Defendant.

Mr. Hurley: My name is Julian A. Hurley and I am an attorney for the First National Bank in this matter now before the Court. I have been acquainted with Lou Colbert for about 20 years or more and was very well acquainted with him. I was acquainted with him when he was running for the legislature. He and I went to Nenana, a town on the railroad, and campaigned together. I was running for Senator at the time and he was running for the Territorial House of Representatives and I was his attorney for a good many years

Appellant's Exhibit A-1—(Continued)  
(Testimony of Julian A. Hurley.)

in different matters prior to the time of his death. He was administrator of the estate of William Kelly, deceased, and I was his attorney in that estate. That was an estate in which there was no will and he applied as a creditor for letters of administration. I also prepared a good many papers for him such as mortgages and different papers of that kind and I saw papers that were kept by him. Referring to Plaintiff's exhibit "F," I wish to state that I have seen this before, but at the time that I saw it, it was in a book from which it appears to have been torn. It was a book that was kept by Lou Colbert in his own handwriting. It was a book with a limber back that had sheets in it the size of this sheet and he had in this particular page references to [173] Kelly's estate of which he was administrator and for which I was attorney and prepared the papers. But in addition to this, there was many other entries there showing money loaned and all in his own handwriting. I don't know where the book is or what became of it, but I recognize this sheet when it was introduced in evidence as coming from that book I had seen. I went over to visit Lou Colbert in October, 1946, after he had entered the hospital and I went over there after the 17th of October and prior to the 23rd day of October. I do not remember the exact date but it was between those days and the reason I fix that is because at the time before I went over there I heard that Thelma Gregor had got authority, signed



## Appellant's Exhibit A-1—(Continued)

(Testimony of Julian A. Hurley.)

by Lou Colbert, authorizing her to write checks on his account in the bank which was written on the 17th of October and I prepared the petition on the 23rd day of October filed with the appointment of the First National Bank of Fairbanks to be guardian of his estate. And I went over to see myself prior to the time that I filed that petition as to what his condition was. I heard rumors in regard to him after he had entered the hospital. I went over there with Harvey Van Hook, who had known Lou a good many years, and I think I forget how he happened to go with me, but it was on account of some conversation we had in regard to Lou and we went over to see him and we went—when we got there, we went to Lou's room and I spoke to him [174] and he spoke to me and I didn't know that he was as ill as he was, although I had heard he had been quite sick and then after a few seconds he looked up and he said, "How did you get over here?" He said, "You had to come all the way from McGrath." "Oh," I says, "no, Lou. We weren't over in McGrath." I said, "We were over in town." "Well," he says, "how did you get over here? It's a long ways." I says, "We just walked across the bridge," and he looked up and kind of grinned and he says, "I can see the bridge from here." So I asked him something else again and he said—oh, yes, I asked him, "Who's your doctor?" He says, "He is Doctor Schaible." He says, "You know, he owns this place here." I says, "Owns the



## Appellant's Exhibit A-1—(Continued)

(Testimony of Julian A. Hurley.)

hospital?" "Yes," he says, "he owns the whole thing." So, I said, "Well, Lou, how are you feeling?" "Oh, pretty good," he says. He says, "You know," he says, "I've got some claims out and everything settled up clear passed my claims here from Chatanika, everything's settled up now," and I said, "Oh, no, Lou, just a little ways out here." He says, "No, everything's settled up," and I talked with him a little longer. Harvey and I, we left and we came back. I forget just what time of the day it was. It was during, might have been little before noon or little after. I think it was a little after noon. I am not sure of the time. But, anyway, I came back over and then I went over to the bank and spoke to Frank DeWree and then I went [175] and got the papers from the 23rd and filed the petition.

I was attorney for the bank as administrator and filed the foreclosures. There was a first mortgage against Lou's property but which was owned by ..... to Albert Bernard. I finished up the foreclosure on that and then I had this case on Lou's mortgage. Lou had the second mortgage. Well, then I forget just exactly when it was, but Allison got a judgment, attached the Graehl Circle Bar, got a judgment against Thelma Gregor and Lou came to talk to me about paying that judgment off. I forget just when that was and I advised him not to do it. I said, "You have to pay the first mortgage off and you haven't got the

## Appellant's Exhibit A-1—(Continued)

(Testimony of Julian A. Hurley.)

money." I says, "I don't know whether or not the property will sell for enough to get your money out of the arrest judgment or not," and he promised me that he wouldn't take it up, but he did afterwards and I was quite surprised. He came to me and says he was going to do it, but I got the assignment of it. We took an assignment of that judgment and he paid it off and I noticed then that his health was not too good, but I didn't think about him being so bad until I—after I found out and until I went over there. I could see after going over to see him that he wasn't mentally as strong and alert in the summer of 1946 as he had been prior to that time. That's all I wish to state. Oh, yes, I would like to make a statement that—one more statement, pardon [176] me. In my experience as United States Attorney in Anchorage for 21½ years and United States Attorney here for 9 years, I have had considerable experience conducting examinations before the Court in connection with persons charged with being insane and not of sound mind. From my conversation with Lou Colbert and my observation of him over there and his actions, I would say that in my opinion he wasn't of sound mind. I thought that he was just as crazy as any man I ever saw committed to the asylum.

## Cross-Examination

By Mr. McCarrey:

Q. As a matter of fact, Mr. Hurley, you were

Appellant's Exhibit A-1—(Continued)  
(Testimony of Julian A. Hurley.)

appointed by the court to be his attorney, to represent him at the time of the incompetency hearing?

A. No, sir.

Q. May I see Exhibit "B"?

A. I prepared the petition for the bank at the request of the bank, filed it asking that they be appointed guardian because of his incompetence to handle his business.

Q. I beg your pardon. It is Exhibit "A." Now, were you present at the time they had the insane hearing? A. I did what?

Q. Were you present at the time that they had the insane hearing?

A. At what hearing? [177]

Q. The incompetency hearing or insane hearing?

A. They had a hearing for an appointment of guardian. I was present, yes.

Q. Was Mr. Colbert present at that time?

A. No, he didn't appear.

Q. Was he—who represented him at that time?

A. Nobody represented him at the the hearing.

Q. He didn't have an attorney at all.

A. No. There was an attorney appeared. Mr. Clasby appeared and asked for a continuance. The court granted it and then after that nobody showed up. It was set and they had a hearing there and I don't remember anybody being there at the time for Lou Colbert at the time the hearing was held.

Q. You as an attorney in the Territory of Alaska— A. What?

Appellant's Exhibit A-1—(Continued)

(Testimony of Julian A. Hurley.)

Q. I say, you as an attorney permitted to practice law in the Territory of Alaska have conducted hearings before, have you not?

A. What kind of hearings?

Q. Insanity or incompetence hearings?

A. I conducted a lot of hearings where men were accused of being insane or up for being charged for the purpose of sending them to the asylum.

A. And isn't it generally the practice, Mr. Hurley, that they appoint someone at that [178] hearing?

A. They do at those hearings, yes.

Q. And it is your testimony there was no one appointed at this time?

A. This wasn't that kind of a hearing.

Q. What kind was it?

A. This was a hearing on the application of the bank as appointment as guardian.

Q. Guardian of what?

A. Of Lou Colbert on account of him being incompetent to handle his own business.

Q. Of person and property?

A. I forget how it is worded, whether it is person and property or whether it's just property. I forget how that was. I don't remember. It is all set out in the record of procedure there, but I don't remember it offhand.

Q. And isn't it your understanding, Mr. Hurley, that it is customary that—to have someone



Appellant's Exhibit A-1—(Continued)  
(Testimony of Julian A. Hurley.)

appointed?

A. Not in that kind of proceeding.

Q. They never had nobody there?

A. Nobody was there that I remember of. He was served a notice and he took the matter up with an attorney and Mr. Clasby appeared in connection with the matter. That's all set out in the record.

Q. Yet he was in the hospital?

A. And no showing was made. [179]

Q. And he was in the hospital at the time?

A. Yes, he was in the hospital.

Q. And the hearing was held even though he was in the hospital and didn't have an attorney?

A. Sure the hearing was held.

Q. Did the jury see Mr. Colbert?

A. There wasn't any jury.

Q. No jury?

A. No, certainly not. There's no provision for a jury in that kind of proceeding in the code. The code provides the procedure and there's no jury provided there.

Q. Now, Mr. Hurley, I believe you testified that you did some work for him?

A. A lot of it at different times, yes.

Q. Did you do any work for him during the summer of 1946?

A. I don't remember for sure. I saw him at times and he was in pretty bad health. I know he could hardly get up at times. He was in the office and I remember several times when he would sit



Appellant's Exhibit A-1—(Continued)

(Testimony of Julian A. Hurley.)

down there, somebody had to take hold of his hands to get him up.

Q. Is that unusual?           A. That was in 1946.

Q. Is that unusual?

A. It was for him, yes, because he had never been that way before. [180]

Q. Isn't it——

A. Not many people that come into the office that I remember where you have to take hold of their arm to help them get up.

Q. Now, did you do any work for him during the month of July, 1946?

A. I can't tell you. I don't think so.

Q. Did you do any work for him during the month of August?           A. I don't think so.

Q. Did you do any work for him during the month of September?

A. I don't believe I did.

Q. Did you do any work for him on the 23rd of September, 1946?

A. No, I don't believe—I don't think I did anything for him in September.

Q. I will ask you if you have had occasion to see Mr. Colbert on the 23rd day of September, 1946?

A. 23rd of September?

Q. Yes.           A. No, I don't think so.

Q. Was Mr. Colbert at your office on the 23rd day of September, 1946?

A. I don't think so.

Q. When was the last time you saw Mr. Colbert

Appellant's Exhibit A-1—(Continued)  
(Testimony of Julian A. Hurley.)

before he went to the hospital if you recall? [181]

A. Well, I would say it was sometime in the summer, but exactly the month I wouldn't be able to say. Whether or not I did any work for him the last time I saw him before he went to the hospital, I wouldn't be able to say that either.

Q. I believe you testified on direct examination that he was not too competent during the summer of 1946?

A. That he was not what?

Q. Too competent mentally.

A. He didn't seem like he was. I wouldn't say that he was incompetent when I saw him in the summer of 1946, but he seemed kind of dull and not like he was before, because Lou was keen, quick and bright and he slowed up a lot, that I just figured that it was health and I didn't think about him, his mind being off at that time. So, that must have been around May or June probably.

Q. And you don't think you saw him after that time?      A. I'd tell you if I did.

Q. And you don't think you did any work after that?      A. I am pretty sure I didn't.

Q. I hand you piece of paper and ask if you can identify it?

A. Oh, this was the assignment of the Allison judgment. Yes, that was in September, 1946. I didn't think it was that late. [182]

Q. What date was that please?

A. 23rd of September.

Appellant's Exhibit A-1—(Continued)

(Testimony of Julian A. Hurley.)

Q. Who prepared that? A. I did.

Q. At whose request did you prepare that?

A. Lou's.

Q. Was Mr. Colbert competent on the day that he signed that?

A. Well, I didn't think he was incompetent at that time.

Q. If you did, you wouldn't have signed that, would you?

A. No. I advised him—it is just as I said before—not to sign this, not to pay that judgment off because he couldn't afford it and it took practically all of his money. I knew that.

Q. Did he pay——

A. And I—he told me that he wouldn't, so he came in with Thelma——

Q. I think that's repetition. I think you have already testified——

A. And he asked me to prepare the assignment of the judgment. I don't know whether he paid me. I don't know how it was.

Q. Did he pay you for that?

A. I don't think he did. He may have. I don't remember. He might have paid me. I handled that case and worked in that case. [183]

Q. Is this your signature on the reverse side as notary public? A. It is.

Q. And is that your signature as witness on the other side? A. Yes, that's mine.

Q. And——

Appellant's Exhibit A-1—(Continued)  
(Testimony of Julian A. Hurley.)

A. I am just mistaken in the time when I saw him, that's all.

Q. Was Peggy Lyle present?

A. She was my—she was present.

Q. And she signed the same time you did?

A. Yes.

Q. Was Mrs. Hayes present at that time?

A. I wouldn't be positive.

Q. Is this her signature there?                      A. Who?

Q. Mrs. Hayes?

A. Oh, yes. She was present when that was signed.

Q. In other words, you wouldn't notarize that unless she was present, would you?

A. No. She was there at the time.

Mr. McCarrey: That's all, your Honor.

Mr. Hurley: That's all. I will call Harvey Van-Hook.

Mr. McCarrey: Your Honor, the reporter is getting pretty tired. Could we have a 5 minute recess? [184]

Mr. Hurley: This is the last witness. It will be pretty short, just a few questions.

The Court: We will adjourn for 5 minutes.

(A 5 minute recess was taken.)

Appellant's Exhibit A-1—(Continued)

HARVEY VanHOOK

called as a witness in behalf of the Defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Hurley:

Q. What is your name? A. VanHook.

Q. What is your first name? A. Harvey

Q. Where do you live, Mr. VanHook?

A. Right now in the Nordale Hotel.

Q. In Fairbanks? A. Yes, sir.

Q. How long have you lived in Alaska?

A. Since 1898.

Q. And what has been your business mostly?

A. Mining.

Q. Were you acquainted with Louis D. Colbert in his lifetime? A. Yes, sir; I was.

Q. How long had you known Lou before he died? [185]

A. Oh, it was in the summer in the 30's when he come to the Forty Mile prospecting. First time I met him was in the 30's.

Q. I see. What was Lou's business?

A. He was prospecting there.

Q. And that was the first time you knew him?

A. That was the first time I met him.

Q. Did you belong to the Pioneers of Alaska?

A. Yes, sir.

Q. Here in Fairbanks? A. Yes, sir.

Q. Did Lou belong?



Appellant's Exhibit A-1—(Continued)  
(Testimony of Harvey VanHook.)

A. Yes, I think he did.

Q. And had you seen him around Fairbanks before he took sick and went to the hospital in 1946?

A. Oh, yes; I saw him right along for a little while.

Q. I see. Were you and he good friends?

A. Yes, sir.

Q. Did you go over to see Lou not long after he went to the hospital?

A. Yes, I was over there just 2 or 3 days after he went to the hospital. He was there and I went over to see him and you went with me too.

Q. That was after he went to the hospital?

A. Yes.

Q. You don't remember what date that [186] was? A. I don't remember the date.

Q. There is nothing by which you can fix it by?

A. No, not for the dates. I don't remember the dates.

Q. Just tell the court how it happened that you went over there?

A. Well, I met you on the street and I asked you if he was in the hospital. You and he were good friends. You said "Yes," you had heard he was there and you asked me if I saw him and I said "No." You said, "Let's go over and see him" so we went over and seen him that afternoon. Right then we went over.

Appellant's Exhibit A-1—(Continued)

(Testimony of Harvey VanHook.)

Q. Was there anybody else there when we were in there that you remember of?

A. I don't think there was.

Q. Do you remember what was said there by—  
(Interrupted)

A. Well, yes— (Interrupted)

Q. (Continuing): Lou and the rest of us?

A. (Continuing): I do remember some things that he said. He knew us both. He seemed to be rational when we went in. He says to you, he says, "How did you come over here?" You said, "We walked over" and he shook his head and says, "That's a long walk. I've been up there and it's a long walk. Which way did you come by, McGrath Road"? You said, "No, we just walked across the bridge from the Federal Building here. You can see the bridge here." He said, [187] "Yes, I see the bridge" and he hesitated a while and started talking again and by and by he says, "This side of the river here is building up might fast in this part of town." You said—he was talking direct to you—and you said, you told him it was a—a—he says says, "This town is going to be built out to Chatanika" and he "owned a lot of property over here too." After that he talked a while. He seemed to get rational then later on. We got ready to go. We didn't stay very long. When we started away, he seemed all right. He says, "I am glad you boys come over and come over again." He seemed all right then, but before he was talking wild.

Appellants Exhibit A-1—(Continued)  
(Testimony of Harvey VanHook.)

Q. What?

A. He talked wild, we come from McGrath, which way did we come from McGrath and it was a long way to walk.

Q. Did he sound—did his talk sound to you like a man who was mentally sane?           A. No.

Q. What?

A. No, he wasn't mentally sane then.

Q. What was the impression you got as to the condition of his mind?

A. I thought plain that his mind was away, he was just permanent off.

Mr. Hurley: That's all. You may [188] cross-examine.

#### Cross-Examination

By Mr. Taylor:

Q. Mr. VanHook, how old are you?

A. How old am I?

Q. Yeah.           A. I am past 79.

Q. And you base your opinion upon Mr. Colbert's mental state by one visit?

A. Oh, I have known him for a good many years and I went to see him back after that, but when I went the next time to the hospital he was asleep. I didn't talk to him and the next time I was there, he was gone.

Q. So, you say because you went over there once and he had hallucinations, you base your opinion as to his being insane, is that right?

Appellants Exhibit A-1—(Continued)

(Testimony of Harvey VanHook.)

A. Yes, sir.

Mr. Taylor: That's all.

Mr. McCarrey: That's all.

Mr. Hurley: We rest, your Honor.

Mr. McCarrey: We have some rebuttal. It won't take very long. I call Mrs. Hayes.

MRS. HAYES

resumed the stand.

Rebuttal

By Mr. McCarrey:

Q. Mrs. Hayes, I will ask you if you know whether or not [189] Doctor Schaible attended Mr. Colbert at the time of his death?

A. He did not.

Q. At the time Mr. Colbert was in the hospital, did Mr. Colbert ever give you any pills?

A. Yes, every day he would give me some after the first 4, 5 days.

Q. What were those pills?

A. I don't know what they were, little white pills. He told me the nurse gave it to him; he didn't want to take it; they didn't do him any good.

Q. Do you know what he did so that he didn't take them?

A. He just kept these pills instead of taking them, keep them and threw it away or something.

Mr. McCarrey: Now, we offer this for identification, your Honor?



Appellants Exhibit A-1—(Continued)  
(Testimony of Mrs. Hayes.)

Mr. Hurley: What is it?

Mr. McCarrey: It is a renewal of a chattel mortgage.

The Court: Petitioner's identification number 13.

(Chattel mortgage received and marked as Petitioner's exhibit number 13 for identification.)

Q. (By Mr. McCarrey): I hand you this and ask if you can identify it?

A. It is an affidavit of renewal of a chattel mortgage. [190]

Q. Whose signature appears thereon?

A. L. D. Colbert.

Q. Where did that come from, if you know?

A. Well, we had a renewal made of the mortgage.

Q. And where has that been since Mr. Colbert's death?

A. Well, it has been, it has always been, it has been among my papers.

Q. And did you give that to me last night?

A. Yes.

Q. At whose request was this drawn up, do you know? A. Lou Colbert's.

Q. And were you present at the time it was drawn up? A. Yes.

Q. Who drew it up?

A. I am not sure who. I am not sure. We went



Appellants Exhibit A-1—(Continued)

(Testimony of Mrs. Hayes.)

to so many different lawyers for so many different things.

Q. Could it have been Mr. Johnson?

A. Yes, it was Mr. Johnson.

Mr. McCarrey: May we have this in evidence as plaintiff's exhibit—petitioner's exhibit?

Mr. Hurley: No objection.

Mr. McCarrey: At this time, your Honor, I would like to for the sake of the record—I think the evidence shows what it is. It's a renewal of a chattel mortgage. I would like to point out that on the back page [191] this shows that it was signed by L. D. Colbert and "subscribed and sworn to by me this 18th day of September, 1945" and signed Maurice T. Johnson, notary public for the Territory of Alaska and it has his notarial seal affixed thereto, 1945.

Mr. Hurley: Let me see that. I have no objection. I just want to see it.

(Document shown to Mr. Hurley.)

The Court: Marked Petitioner's Exhibit "M."

(Chattel mortgage previously marked Petitioner's exhibit 13 for identification received and marked Petitioner's Exhibit "M" in evidence.)

Q. (By Mr. McCarrey): I hand you this piece of paper and ask you if you know what that is?

Mr. Hurley: Was that recorded, that renewal?

Appellants Exhibit A-1—(Continued)  
(Testimony of Mrs. Hayes.)

I forgot to look. Could you look to see if it was recorded?

The Court: No.

A. This is a contract and agreement between Mr. Colbert and I for the Allison judgment.

Q. Who drew that up, if you know?

A. Mr. Hurley.

Q. At whose request was it prepared?

A. At Lou Colbert's.

Q. Did Mr. Colbert ask you to sign this?

A. Yes. [192]

Q. Is your signature appear thereon?

A. Yes. I am quite sure it is. Yes, it is.

Q. And did you sign it the same time that Mr. Colbert did? A. Yes.

Mr. McCarrey: We offer this in evidence.

Mr. Hurley: No objection.

(Contract and agreement, dated September 23, 1946, was received and admitted into evidence and marked Petitioner's Exhibit "N.")

Mr. Hurley: This is a contract and agreement. I thought you said it was the assignment of the Allison judgment?

Mr. McCarrey: No, it is a contract. It amounts to the same thing.

Mr. Hurley: I have no objection.

Mr. McCarrey (Continuing): Made and entered into this 23rd day of September, 1946, by and between L. D. Colbert of Fairbanks, Alaska, first

Appellants Exhibit A-1—(Continued)

(Testimony of Mrs. Hayes.)

party and Thelma D. Hayes of the same place, second party. And it is signed by—witnessed by—signed by L. D. Colbert and Thelma D. Hayes and witnessed by Julien A. Hurley and Peggy Lyle and acknowledgement taken by Julien A. Hurley on the 23rd day of September, 1946.

Q. (By Mr. McCarrey): Now, I will ask you, Mrs. Hayes, whether or not Mr. [193] Colbert and Mr. Stroeker ever had any words of difference?

A. They had many words of difference during the several years I knew them.

Q. How do you know they had words of difference?

A. I was in there different times with them and every time I would go with Lou Colbert to get a loan, he would go to get the money at the bank and Stroeker would have an argument with him about it.

Q. Did you hear Mr. Stroeker testify that they had a conversation at one time with reference to a renewal of a chattel mortgage? A. Yes.

Q. Do you recall what year that was that Mr. Stroeker said that Mr. Colbert didn't know about a chattel mortgage? A. Beg your pardon?

Q. Do you recall what year that was?

A. Renewal of the chattel mortgage?

Q. Yes. The conversation that he referred to?

A. Well—that was in 1946.

Q. And did Mr. Stroeker and Mr. Colbert have any words of difference in your presence during the year 1946? A. Yes, they did.

Appellants Exhibit A-1—(Continued)  
(Testimony of Mrs. Hayes.)

Q. Will you tell the approximate date, if you recall?

A. Around Christmas, week between Christmas and New Years in 1946. Lou Colbert went down to the bank to see about the [194] will, why they wouldn't give me the will that he had sent me to get when I had a power of attorney and, oh, he brought up several other things why Stroeker should should have entered into such a dirty trick to him while he was in the hospital.

Q. What dirty trick?

A. Well, they filed—sent those papers to him as soon as he went to the hospital.

Q. Do you know whether or not Mr. Colbert ever asked Mr. Stroeker for his other will that he had there?

A. Yes, he asked him for it.

Q. In your presence?

A. Yes.

Q. And in the presence of Mr. Stroeker?

A. Yes.

Q. And what did Mr. Stroeker say?

A. He said——

Mr. Hurley: Well, now, we object to this, if the Court please.

A. He said——

Mr. McCarrey: Your Honor——

Mr. Hurley: This is not rebuttal or anything of the kind that I can see. Mr. Stroeker wasn't asked anything about that, whether he came in there in December of 1946 to the bank——

The Court: Objection sustained. [195]



Appellants Exhibit A-1—(Continued)

(Testimony of Mrs. Hayes.)

Mr. Hurley: —all this testimony be stricken out. If it don't, I will have to call Mr. Stroeker back and ask him if there was anything of that kind.

Mr. McCarrey: What's the ruling, if the Court please?

The Court: Objection sustained.

Mr. McCarrey: Very well. That's all.

Mr. Hurley: That's all.

Mr. McCarrey: Your Honor, petitioner rests as far as rebuttal is concerned.

Mr. Hurley: We rest, your Honor.

Mr. McCarrey: Mr. Hurley has suggested that no argument be had to your Honor.

Mr. Hurley: I said I would be willing to waive argument if you were.

Mr. McCarrey: Well, that's your statement that you made to me. Does the court have any pleasure in that respect?

The Court: The arguments may be waived. The Court will take this matter under advisement until 2 o'clock on Tuesday, June the 20th.

Mr. McCarrey: Your Honor, I will not be here at that time. Will you see that I am properly advised as to——

The Court: Yes, I will see that you are [196] properly advised.

Mr. McCarrey: Very well.

The Court: That's all.

(Off the record discussion.)



## Appellants Exhibit A-1—(Continued)

The Court: You can have until 10 o'clock on the 28th. That would be——

Mr. McCarrey: Would you just read into the record that counsel requested the opportunity to submit briefs?

Mr. Hurley: The petitioner should have until 10 o'clock on the 28th of June and the bank shall have 10 days thereafter.

The Court: Ten days thereafter.

Mr. Hurley: In which to file authorities.

Mr. McCarrey: Very well.

Mr. Hurley: Whatever they want to.

Mr. McCarrey: Very well, thank you. [197]

(Court adjourned 5:35 p.m. June 16th, 1950.)

## Reporter's Certificate

I, Charles Belida, the duly appointed court stenographer in and for the above-named court do hereby certify as follows, to wit:

That on the 16th day of June, 1950, I was the official court stenographer in and for the above-mentioned court; that upon the request of Mr. J. L. McCarrey, counsel for petitioner in the above-named cause, I reported in shorthand all of the oral proceedings had on the 16th day of June, 1950, in the Probate Court, Fairbanks, Alaska, before the Hon. Clinton B. Stewart, U. S. Commissioner; that the foregoing 197 pages constitute a full, true, complete and accurate transcript of all of my shorthand notes taken at said trial on the 16th day of June, 1950.

Appellants Exhibit A-1—(Continued)

Dated at Fairbanks, Alaska, this 5th day of September, 1950.

/s/ CHARLES BELIDA,  
Official Court Reporter.

Subscribed to and sworn to before me this 5th day of September, 1950.

[Seal] /s/ JOHN B. HALL,  
Clerk of Court, Notary Public in and for the Territory of Alaska.

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APPELLANT'S EXHIBIT A

In the Probate Court for Fairbanks Precinct,  
Fourth Judicial Division, Territory of Alaska

No. 1114

In the Matter of  
The GUARDIANSHIP of LOUIS D. COLBERT,  
an incompetent person.

JUDGMENT

Now, on this 15th day of November, 1946, this cause having come on regularly to be heard, before me as United States Commissioner and Ex-Officio Probate Judge of the above-entitled Court, and it appearing from the records and files herein that the Petition of the First National Bank of Fairbanks, Alaska, for the appointment of it as guardian to take care, custody, and management of the Estate

## Appellant's Exhibit A (Continued)

of Louis D. Colbert, an incompetent person, and service of said petition having been made by personal service upon the said Louis D. Colbert by delivery of a copy of said Petition together with a copy of the Citation and Notice of Hearing of Application for Appointment of a Guardian of an Incompetent Person on the 23d day of October, 1946, and it further appearing that on the 6th day of November, 1946, Charles J. Clasby, an attorney of Fairbanks, Alaska, appeared for the purpose of asking a continuance of the hearing of said cause, which had heretofore been set on the 6th day of November, 1946, which said continuance was granted so that the said Louis D. Colbert could employ an attorney to represent him if so desired. And the said Louis D. Colbert after said continuance was granted and after the service of said Petition and service of said Citation and Notice of Hearing of Application for Appointment of a Guardian of an Incompetent Person upon him failed to appear, either in person or by attorney, and that thereupon witnesses were called, examined by attorney for Petitioner, and by the Court, which said witnesses included Dr. Arthur J. Schaible, doctor for the said Louis D. Colbert, Charles Lindgren, a member of the Pioneer's Lodge and a friend of the said Louis D. Colbert, and Frank DeWree, as Trust Officer and Petitioner for the First National Bank of Fairbanks, Alaska, and Julien A. Hurley, attorney for the said Louis D. Colbert in cases on file in the District Court for the Territory of Alaska, Fourth

Appellant's Exhibit A (Continued)

Division, and the Court having heard the testimony of the witnesses, and established its findings of fact and conclusions of law herein, and ordered judgment in accordance therewith;

Now, Therefore, it is Ordered, Adjudged and Decreed that the First National Bank of Fairbanks, Alaska, be, and is hereby, appointed the Guardian of the said Louis D. Colbert to take care, custody and management of the real estate and personal property of the said Louis D. Colbert, who is incompetent of conducting his own affairs, and the said First National Bank of Fairbanks, Alaska, shall qualify as such guardian in accordance with law and shall conduct itself in accordance with the law and the orders of this Court, and to be effective upon qualification as required by law. Guardian to furnish bond in the amount of \$5,000.00

Done at Fairbanks, Alaska, on this 15th day of November, 1946.

[Seal]    /s/ ELEANOR M. ELY,  
United States Commissioner and Ex-Officio Probate  
Judge.

[Endorsed]:    Filed November 19, 1946.

Entered in Court Journal No. 19, page 112.



## Appellant's Exhibit A (Continued)

In the Probate Court for Fairbanks Precinct,  
Fourth Judicial Division, Territory of Alaska

No. 1114

In the Matter of  
The GUARDIANSHIP of LOUIS D. COLBERT,  
an Incompetent Person.

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW

This cause coming on regularly to be heard on this 15th day of November, 1946, before me as United States Commissioner and Ex-Officio Probate Judge of the above-entitled Court, and it appearing from the records and files herein that the Petition of the First National Bank of Fairbanks, Alaska, for the appointment of it as guardian to take care, custody and management of the Estate of Louis D. Colbert, an incompetent person, and service of said petition having been made by personal service upon the said Louis D. Colbert by delivery of a copy of said Petition together with a copy of the Citation and Notice of Hearing of Application for Appointment of a Guardian of an Incompetent Person on the 23d day of October, 1946, and it further appearing that on the 6th day of November, 1946, Charles J. Clasby, an attorney of Fairbanks, Alaska, appeared for the purpose of asking a continuance of the hearing of said cause, which had heretofore been set on the 6th day of November, 1946, which said continuance was granted so that the said Louis D. Colbert could



## Appellant's Exhibit A (Continued)

employ an attorney to represent him if so desired. And the said Louis D. Colbert after said continuance was granted and after the service of said Petition and service of said Citation and Notice of Hearing of Application for Appointment of a Guardian of an Incompetent Person upon him failed to appear, either in person or by attorney, and that thereupon witnesses were called, examined by attorney for Petitioner, and by the Court, which said witnesses included Dr. Arthur J. Schaible, doctor for said Louis D. Colbert, Charles Lindgren, a member of the Pioneer's Lodge and a friend of the said Louis D. Colbert, and Frank DeWree, as Trust Officer and Petitioner for the First National Bank of Fairbanks, Alaska, and Julien A. Hurley, attorney for the said Louis D. Colbert in cases on file in the District Court for the Territory of Alaska, Fourth Division, all of which said witnesses testified as to the mental condition of the said Louis D. Colbert and the necessity of appointing a guardian to manage and take care of the affairs of the said Louis D. Colbert as an incompetent person. And the said Court after hearing the evidence introduced in this action in support of the Petition filed herein, and after considering the same, does now make and establish the following as its Findings of Fact herein.

## I.

That your petitioner is a banking corporation doing business in Fairbanks, Alaska, and is qualified and competent under the law to act as guardian to take care, custody and management of the estate,

## Appellant's Exhibit A (Continued)

real and personal property, of the above-named Louis D. Colbert, who is incapable of conducting his own affairs.

## II.

That the said Louis D. Colbert is about 70 years of age and has property, both real and personal, in Fairbanks Precinct, Fourth Division, Territory of Alaska, which needs care and attention, the exact nature and description of which is to your petitioner unknown.

## III.

That the said Louis D. Colbert has by reason of illness (arteriosclerotic dementia) become mentally incompetent and incapable either to care for himself or of conducting his own affairs or to manage his property.

## IV.

That it appears from the evidence that the said Louis D. Colbert is incompetent mentally to attend his own affairs and that he has property which must be protected and which cannot be protected by himself, and in order to protect him and his heirs that a guardian should be appointed for him, and that the First National Bank of Fairbanks, Alaska is a proper corporation to represent him.

And, from the foregoing Findings of Fact, the Court does now make and establish the following as its Conclusions of Law herein, to-wit:

## Conclusions of Law

## I.

That the said Louis D. Colbert is mentally in-

Appellant's Exhibit A (Continued)

competent to care for himself or to conduct his business affairs.

II.

That a guardian should be appointed, and that the First National Bank of Fairbanks, Alaska, is a proper corporation to be appointed for said purpose.

Let Judgment enter accordingly.

Dated at Fairbanks, Alaska, this 15th day of November, 1946.

[Seal]      /s/ ELEANOR M. ELY,  
United States Commissioner and Ex-Officio Probate  
Judge.

Entered in Court Journal, No, 19, Page 111.

[Endorsed]: Filed Nov. 19, 1946.

In the Probate Court for Fairbanks Precinct,  
Fourth Judicial Division, Territory of Alaska

No. 1114

In the Matter of  
The GUARDIANSHIP of LOUIS D. COLBERT,  
an Incompetent Person.

MOTION FOR CONTINUANCE

Comes Now, Chas. J. Clasby on behalf of Louis D. Colbert, for the purpose of this Motion only, and respectfully moves the Court for an Order granting continuance on the hearing in this case for a suffi-

## Appellant's Exhibit A (Continued)

cient time to enable the said Louis D. Colbert to secure the assistance of council.

This Motion is based upon the records and files herein and the Affidavit of Chas. J. Clasby attached hereto.

/s/ CHAS. J. CLASBY.

United States of America,  
Territory of Alaska—ss.

Chas. J. Clasby, being first sworn on oath deposes and says:

Prior to the 29th day of October, 1946, Louis D. Colbert, by correspondence, asked Mr. E. B. Collins to act as his Council in matter referred to in the Motion to which this Affidavit is attached. That Mr. Collins was unable to act for Mr. Colbert for the reason set forth in his letter of October 29, 1946, to Mr. Colbert, a copy of which is attached to this Affidavit.

That on the 5th day of October, 1946, at about 5:15 p.m., it was brought to Affiant's attention by virtue of the letters and the envelopes attached to this original Affidavit, and copies attached to the copies of this Affidavit, that the said Louis D. Colbert was depending upon Affiant to appear in this proceeding for him. By reason of other commitments to other clients, it is impossible for Affiant to properly prepare and present a defense for said Louis D. Colbert; and that Affiant was not informed of Mr. Louis D. Colbert's wishes in sufficient time



Appellant's Exhibit A (Continued)

to so advise Mr. Louis D. Colbert so that he could secure the services of other Council.

The Affiant, from conversations with Mr. Collins and other attorneys, is slightly familiar with the issues in this case and from such familiarity states that the issues are such that will require considerable preparation by an attorney in order to adequately present a defense for the said Louis D. Colbert; and that this Court should grant a continuance of not less than ten days in order to enable Mr. Colbert to prepare his defense in said action.

/s/ CHAS. J. CLASBY.

Subscribed and sworn to before me this 6th day of November, 1946.

[Seal] /s/ MYRTLE L. BOWERS,

Notary Public, In and for the  
Territory of Alaska.

My commission expires: 6/10/50.

October 29, 1946

(Copy)

Mr. L. D. Colbert  
c/o St. Joseph's Hospital  
Fairbanks, Alaska

Dear Mr. Colbert:

I received your letter requesting that I represent you at the hearing on November 6, 1946.

It will be impossible for me to represent you for



## Appellant's Exhibit A (Continued)

the reason that I have been ill for the past several weeks and have not been able to attend to very many of the office affairs, and have been advised by the Doctor that it is necessary for me to leave for Seattle for medical attention. With that in view I am now awaiting for the first available transportation by plane. Therefore, I will be unable to be of service to you.

Yours very truly,

E. B. COLLINS.

EBC;mb

[Envelope.]

[U. S. 2 cent stamp.]

[Postmark]: Fairbanks, Alaska, 4 p.m., Oct. 31, 1946.

[Addressee]: Mrs. Thelma Hayes

Graehl Circle Bar  
Fairbanks, Alaska

Thelma

The Sister Superior has forbidden me to use the phone. Is everything O.K.

They will try the suit Friday unless Clasby stops me.

As I can't phone I am leaving the lawsuit to you. I tried to get out of here and they stopped me.

Appellant's Exhibit A (Continued)

If Clasby tells me I can go after the suit I'll come over.

LOU.

Bring answer yourself or send it personally.  
Room 225.

[Envelope]

[Addressee]: Collins & Clasby  
Fairbanks, Alaska

[No stamp or postmark]

Hospital,  
Oct. 24

they, will try me on Nov. 6 for Insanity. I want you to be my lawyer, Hurley is the prosecutor and is after my property.

I got notice yesterday from the Marshall Office.

As Thelma is looking after my papers you can look them over. It is hard to telephone from the Hospital so I take this way of writing you, I have been sick over a month *rhuetmatism*, and it has turned to mental affliction so Dr. Schaible says to find me *same*, which I can show.

I will see you as soon as I can. Thelma has charge of my papers. Very truly L. D. Colbert

Appellant's Exhibit A (Continued)

L. D. Colbert

Box 1356

Fairbanks Alaska

Clinic

Oct. 24, '46

Thelma

They will try me on Nov. 6, tell Mr. Clasby, and get him to take my case.

I can't phone from here. Let me hear from you.

Yours,

LOU.

[Endorsed]: Filed Nov. 6, 1946.

In the Probate Court for Fairbanks Precinct,  
Fourth Judicial Division, Territory of Alaska

No. 1114

In the Matter of  
The GUARDIANSHIP of LOUIS D. COLBERT,  
an Incompetent Person.

PETITION FOR APPOINTMENT OF GUARD-  
IAN TO TAKE CARE, CUSTODY, AND  
MANAGEMENT OF THE ESTATE OF  
LOUIS D. COLBERT, AN INCOMPETENT  
AND INCAPABLE PERSON

To the Honorable Eleanor M. Ely, Judge of the  
Above entitled Court,

The petitioner, The First National Bank of Fair-  
banks, Alaska, a corporation organized and existing

Appellant's Exhibit A (Continued)

under and by virtue of the laws of the United States, by and through its Trust Officer, Frank P. DeWree, respectfully shows:

I.

That your petitioner is a banking corporation doing business in Fairbanks, Alaska and is qualified and competent under the law to act as guardian to take care, custody and management of the estate, real and personal property, of the above-named Louis D. Colbert, who is incapable of conducting his own affairs.

II.

That the said Louis D. Colbert is about 67 years of age and has property, both real and personal, in Fairbanks Precinct, Fourth Division, Territory of Alaska, which needs care and attention, the exact nature and description of which is to your petitioner unknown.

III.

That the said Louis D. Colbert has by reason of illness (arteriosclerotic dementia) become mentally incompetent and incapable either to care for himself or of conducting his own affairs or to manage his property.

Wherefore, your petitioner prays that it be appointed guardian to take care, custody and management of the estate, and of the real and personal property of the said Louis D. Colbert, and that a time be set for hearing this petition and that upon such hearing and the proofs to be adduced thereat

Appellant's Exhibit A (Continued)  
that Letters of Guardianship of said estate may be  
issued to your petitioner.

FIRST NATIONAL BANK  
OF FAIRBANKS,  
ALASKA,

/s/ FRANK P. DeWREE,  
Trust Officer.

/s/ JULIEN A. HURLEY,  
Attorney for Petitioner.

United States of America,  
Territory of Alaska—ss.

I, Frank P. DeWree, being first duly sworn upon  
oath, depose and say:

I am the Trust Officer of the First National Bank  
of Fairbanks, Alaska; that I have read the fore-  
going Petition for Appointment of Guardian, know  
the contents thereof and that the matter and things  
therein stated are true, as I verily believe.

/s/ FRANK P. DeWREE,

Subscribed and sworn to before me this 23d day  
of October, 1946.

[Seal]     /s/ JULIEN A. HURLEY,  
Notary Public in and  
For the Territory of Alaska.

My Commission expires June 12, 1949.

[Endorsed]: Filed Oct. 23, 1946.



APPELLANT'S EXHIBIT B

In the Probate Court for the Fairbanks Precinct,  
Fourth Division, Territory of Alaska

No. 1141

In the Matter of  
The Estate of LOUIS D. COLBERT, also known  
as L. D. COLBERT, Deceased

FIRST NATIONAL BANK, Executor

LETTERS TESTAMENTARY

United States of America,  
Territory of Alaska,  
Fairbanks Precinct—ss.

To All Persons To Whom These Presents Shall  
Come, Greeting:

Know Ye, That the Will of Louis D. Colbert, also known as L. D. Colbert, Deceased, a copy of which is hereto annexed, has been duly proven before the Commissioner for the Precinct aforesaid, and that the First National Bank, of Fairbanks, Alaska, who is named in said Will as Executor, has been duly appointed such Executor by the Commissioner aforesaid. This, therefore, authorizes the said First National Bank, to administer the estate of the said Louis D. Colbert, also known as L. D. Colbert, deceased, according to law.

In Testimony Whereof, I have hereunto sub-

scribed my name and affixed the seal of this Court this 27th day of May, 1947.

[Seal]      /s/ EVERETT E. SMITH,  
United States Commissioner and Ex-officio Probate  
Judge in and for the Fairbanks Precinct,  
Fourth Division, Territory of Alaska.

## WILL

Know All Men By These Presents That I, Louis D. Colbert, of Fairbanks, Alaska, Territory of Alaska, and being of sound and disposing mind and memory, not acting by reason of fraud, duress, menace, or undue influence of any character whatsoever, do hereby make, publish, and declare this to be my Last Will and Testament, hereby revoking any and all former wills by me made.

1. It is my will that my just debts and the charges of my funeral be paid as soon as can conveniently be done after my decease, and I leave the charge of my funeral arrangements to the direction of my executor hereinafter named.

2. After all my just debts are paid and the expenses of administration, I give, devise, and bequeath my estate as follows:

(a) The sum of One Thousand Dollars (\$1000.00) to the Pioneers of Alaska, Igloo No. 4, Fairbanks, Alaska.

(b) The sum of One Thousand Dollars (\$1,000.00) to my niece, Eleanor Colbert, residing in Elkhart, Indiana.

(c) All the rest and residue of my estate,

both real and personal, to my sister Emma Colbert, residing at East 23rd Street, Indianapolis, Indiana.

3. I do hereby nominate, constitute, and appoint the First National Bank of Fairbanks, Alaska, the executor of this my Last Will and Testament.

In Witness Whereof, I, Louis D. Colbert, the testator above named, have to this my Last Will and Testament, hereunto subscribed my name in the presence of witnesses, on this, the fourteenth day of November, A. D. one thousand nine hundred thirty eight.

/s/ LOUIS D. COLBERT.

**Attestation**

The foregoing instrument, consisting of two (2) pages of typewritten matter, including the page signed by the testator, was, at the date thereof, by the said Louis D. Colbert, the maker thereof, signed in our presence and in the presence of each of us and at the time of his subscribing of said instrument he declared that it was his will and at his request and in his presence and in the presence of each other we have subscribed our named as witness thereto.

/s/ BARBARA WOODWARD,  
Residing at Fairbanks,  
Alaska.

/s/ ALBERT C. VISCA,  
Residing at Fairbanks,  
Alaska.

APPELLANT'S EXHIBIT C

LAST WILL AND TESTAMENT OF

LOUIS D. COLBERT

Know All Men By These Presents, that I, Louis D. Colbert, of Fairbanks, Alaska, being of lawful age and of disposing mind and memory, and not acting under duress, fraud, menace or the undue influence of any persons or person whomsoever, do make, publish and declare this to be my Last Will and Testament in the manner following:

1. I direct that the expense of my last illness and burial be paid as soon as can conveniently be done, as well as all my other just obligations.

2. I hereby bequeath unto Thelma Gregor Hayes, of Fairbanks, Alaska, all my property, real, personal and mixed, wheresoever situate, and of every kind and nature, of which I may die possessed, or to which I am entitled at the time of my death, to be and become her sole and separate property; provided however, the said Thelma Gregor Hayes shall pay to my sister Emma Colbert, the sum of One Thousand (\$1000.00) Dollars; also providing that the said Thelma Gregor Hayes convey certain portions of property now possessed by me to such persons as may be designated by me prior to my passing away.

3. I hereby appoint Thelma Gregor Hayes, to be the executor of this, my last will and testament; and I further direct that the probate of my estate be carried out without the intervention of any court



or court whatsoever, except as may be required by law.

4. I hereby revoke any and all wills heretofore by me made.

In Witness Whereof, I have hereunto set my hand this 22nd day of October, 1946.

/s/ L. D. COLBERT.

In the Presence of:

/s/ JAMES F. HAYNES,

/s/ ARTHUR A. BENZ,

/s/ V. A. COBELL.

#### Attestation of Witnesses

We, the undersigned, whose names are subscribed as witnesses to the foregoing instrument, do hereby certify that the said instrument, consisting of one page besides this page, was on the date hereof signed and subscribed to by Louis D. Colbert in our presence, and in the presence of each of us, and the said Louis D. Colbert then and there declared and published the said instrument to be his last will and testament, and we, at his request, and in his presence, and in the presence of each other have subscribed our names as witnesses thereto.



Dated this 22nd day of October, 1946.

/s/ JAMES F. HAYNES,  
Residing at Fairbanks,  
Alaska.

/s/ ARTHUR A. BENZ,  
Residing at Fairbanks,  
Alaska.

/s/ V. A. COBELL.

[Endorsed]: Filed June 11, 1947.

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APPELLANTS EXHIBIT D  
LAST WILL AND TESTAMENT OF LOUIS  
D. COLBERT

Know All Men By These Presents, that I, Louis D. Colbert, of Fairbanks, Alaska, being of lawful age and of disposing mind and memory, and not acting under duress, fraud, menace or the undue influence of any persons or person whomsoever, do make, publish and declare this to be my last will and testament in the manner following:

I.

1. I direct that the expenses of my last illness and burial be paid as soon as can conveniently be done, as well as all my other just obligations.

2. I hereby bequeath unto Thelma Gregor Hayes, of Fairbanks, Alaska, all my property, real, personal and mixed, wheresoever situate, and of every

kind and nature, of which I may die possessed, or to which I am entitled at the time of my death, to be and become her sole and separate property; provided however, the said Thelma Gregor Hayes shall pay to my sister, Emma Colbert, of Indianapolis, Indiana, the sum of \$25.00 per month so long as my said sister shall live, the same to be paid out of the income or principal of my estate. *Providing certain portions of property be willed to if any persons listed by me to Thelma Gregor Hayes at later time.\**

3. I hereby appoint Thelma Gregor Hayes, to be the executor of this, my last will and testament; and I further direct that the probate of my estate be carried out without the intervention of any court or courts whatsoever, except as may be required by law.

4. I hereby revoke any and all wills heretofore by me made.

In Witness Whereof, I have hereunto set my hand this 22nd day of October, 1946.

/s/ L. D. COLBERT.

#### Attestation

We, the undersigned, whose names are subscribed as witnesses to the foregoing instrument, do hereby certify that the said instrument, consisting of one page besides this page, was on the date hereof

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\*Matter appearing in italic is in longhand in ink and initialed L.D.C. on original.

signed and subscribed to by Louis D. Colbert in our presence, and in the presence of each of us, and the said Louis D. Colbert then and there declared and published the said instrument to be his last will and testament, and we, at his request, and in his presence, and in the presence of each other have subscribed our names as witnesses thereto.

Dated this 22nd day of October, 1946.

/s/ V. A. COBELL,  
Residing at Fairbanks,  
Alaska.

/s/ ARTHUR A. BENZ,  
Residing at Fairbanks,  
Alaska.

6/16/50.

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## APPELLANT'S EXHIBIT E

### Power of Attorney

Know All Men By These Presents: That I, Louis Colbert of Fairbanks, Alaska, have made, constituted and appointed, and by these presents do make, appoint and constitute Thelma Hayes, of Fairbanks, Alaska, my true and lawful attorney for me and in my name to take charge of all of my property; to purchase and sell, either for cash or on credit, all such articles and property as she may deem useful and proper as connected with said property; to draw, accept, make and endorse bills of exchange, checks, and promissory notes; to state accounts; to

sue and prosecute, collect, compromise, or settle all claims or demands due or to become due, now existing or hereafter to arise in my favor, and to adjust, settle, and pay all claims and demands which now exist against me or may hereafter arise, either as connected with my property or otherwise; to take the general management and control of my affairs, property and business and therein to buy, sell, pledge or mortgage, and to execute and enter into bonds, contracts, mortgages, and deeds connected therewith; and in general to do all acts and things which she may consider useful or necessary connected with my business, property and interest.

Hereby Ratifying and Confirming all that my said attorney shall do or cause to be done by virtue of these presents.

In Witness Whereof, I have hereunto set my hand this 7th day of October, 1946.

/s/ LOUIS D. COLBERT.

United States of America,  
Territory of Alaska—ss.

This is to Certify that before me, the undersigned, a Notary Public in and for the Terirtory of Alaska, duly commissioned and sworn, personally appeared Louis Colbert, to me personally known and known to me to be the identical person who executed the above and foregoing instrument and he acknowledged to me that he executed the same freely and voluntarily and for the purposes therein mentioned.

In Witness Whereof, I have hereunto set my hand and affixed my official seal this 17th day of October, 1946.

[Seal]     /s/ WARREN A. TAYLOR,  
Notary Public for Alaska.

My Commission expires 8/11/49.

No. 102,341

Territory of Alaska,  
Fourth Judicial District—ss.

Filed for record at request of Thelma Hayes on the 17 day of October, 1946, at 20 min. past 4 p.m. and recorded in Vol. 8 of Power/Atty., page 537, Fairbanks Recording District.

/s/ ELEANOR M. ELY,  
Recorder.

6/16/50.



## APPELLANT'S EXHIBIT F

Wm. Kelly Estate  
Appraised Nov 5, 1942

Rec'd.

## Real Estate

House and lot across road east of  
Gilleam Hangar..... \$1200.00

## Personal Property

	Cash First Nat'l Bank.....	1392.41
1506.43*	Cash Bank of Fairbanks.....	113.99
	Carpenter tools.....	35.00
	Gold watch.....	30.00
	Wages from U. S.....	412.00
462.00*	Vaughn note (214) settled at...	50.00
	9 months rent at 12.50	
303.00	per month.....	100.50

---

 2271.43

Oct. 7	Received from Social Security	
	Board Funeral Expense.....	141.06
Oct. 7	Rent Kelly cabins.....	25.00
Nov. 2	" " " .....	12.50
Dec. 2	" " " .....	12.50
Jan. 2	" " " .....	12.50

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 2272.43

\* [In margin on original.]

Feb.	2/44	Rent Kelly Cabins .....	12.50
Mar.	2	Rent Kelly cabins .....	12.50
Apr.	14	Rent Kelly cabins .....	12.50
May	4	Rent Kelly cabins .....	12.50
June	4	Rent Kelly cabins .....	12.50

6/16/50.

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APPELLANT'S EXHIBIT G

Fairbanks, Alaska

October 23, 1946

Fairbanks Agency Co.

Fairbanks, Alaska

Dear Sirs:

This will authorize you to allow Thelma Hayes to have access to my safe deposit box in your place of business.

Very truly yours

/s/ L. D. COLBERT.

Witnessed by:

/s/ KENNETH D. WIRE,

/s/ ARTHUR A. BENZ.

6/16/50.

APPELLANT'S EXHIBIT H

[Check]

First National Bank of Fairbanks  
59-7

No.2

Fairbanks, Alaska Sept. 28, 1946.

Pay to the order of: Cash.....\$ 10.00  
..... Dollars

/s/ L. D. COLBERT

Address: Fairbanks

[Stamped]: Paid 9/28/46.

[Check]

First National Bank of Fairbanks  
59-7

Fairbanks Alaska Sept. 26, 1946.

Pay to the order of: Corner Drug Store..\$ 1.25  
One dollar and 25 cents.....Dollars

/s/ L. D. COLBERT

Address: Fairbanks

[Stamped]: Paid 9/27/46.

[Reverse]

Stamped: Pay to the order of Any Bank, Banker  
or Trust Co. Endorsement Guaranteed  
Corner Drug Store Fairbanks, Alaska

## APPELLANT'S EXHIBIT H—(Continued)

[Check]

First National Bank of Fairbanks

59-7

Fairbanks, Alaska Sept. 26, 1946.

Pay to the order of: L. D. Colbert.....\$ 1.60

One dollar and 60 cents.....Dollars

/s/ L. D. COLBERT

Address: Fairbanks

Stamped: Paid 9/27/46.

[Reverse]

[Endorsed]: /s/ L. D. COLBERT

Stamped: For Deposit First National Bank, Fairbanks, Alaska. The Model Cafe, John Klopfer, Mgr.

[Check]

First National Bank of Fairbanks

59-7

Fairbanks, Alaska Oct. 2, 1946.

Pay to the order of: Cash.....\$ 20.00

.....Dollars

/s/ L. D. COLBERT

Address: Fairbanks

[Stamped]: 10/2/46.

[Reverse]

[Stamped]: /s/ L. D. COLBERT

APPELLANT'S EXHIBIT H—(Continued)

[Counter Check]

First National Bank of Fairbanks

59-7

Fairbanks, Alaska Sept 2, 1946.

Pay to the order of Arctic Piggly Wiggly

Co. ....\$ 14.58

Fourteen Dollars and 58 cents.....Dollars

/s/ L. D. COLBERT

Address: Fairbanks

Closed Feb. '46.

[Stamped]: Paid 9/7/46.

[Reverse]

Stamped: Pay Bank of Fairbanks of Fairbanks,  
Alaska, or Order Arctic Piggly Wiggly  
Co.

[Stamped]: Pay to the Order of Any Bank or  
Trust Co. All prior endorsements  
guaranteed. Sep. 7, 1946. Bank of  
Fairbanks, Alaska. 59-20.

[Counter Check]

First National Bank of Fairbanks

59-7

Fairbanks, Alaska Aug. 26, 1946.

Pay to the order of: Fairbanks Insurance Agency,  
Fairbanks

Nineteen dollars .....Dollars

/s/ L. D. COLBERT

Address: Fairbanks

[Stamped]: Paid 8/31/46.



APPELLANT'S EXHIBIT H—(Continued)  
[Reverse]

Stamped: Pay to the order of First National  
Bank of Fairbanks, Alaska. For de-  
posit Fairbanks Insurance Agency.

[Check]

First National Bank of Fairbanks  
59-7

Fairbanks, Alaska, Oct. 10, 1946.

Pay to the order of Healey River Coal Co...\$ 14.16  
Fourteen dollars and 16 cents.....Dollars

/s/ L. D. COLBERT

Address: Fairbanks

[Stamped]: Paid 9/12/46.

[Reverse]

Stamped: For deposit only to Bank of Fairbanks.  
Sourdough Express. 59-20.

[Stamped]: Pay to the order of any Bank [il-  
legible] Co. All prior endorsements  
guaranteed. Sep. 12, 1946. Bank of  
Fairbanks, Fairbanks, Alaska, 59-20.

[Check]

First National Bank of Fairbanks  
59-7

Fairbanks, Alaska Aug. 1, 1946.

Pay to the order of L. D. Colbert.....\$ 26.69  
Twenty six dollars and 69 cents.....Dollars

/s/ L. D. COLBERT

Address: Fairbanks

[Stamped]: Paid 8/3/46.

~ APPELLANT'S EXHIBIT H—(Continued)

[Reverse]

Stamped: Pay Bank of Fairbanks of Fairbanks,  
Alaska, or order Arctic Piggly Wiggly  
Co.

[Stamped]: Pay to the order of any Bank,  
Banker or Trust Co. All prior en-  
dorsements guaranteed. Aug. 3, 1946.  
Bank of Fairbanks, Fairbanks, 59-20,  
Alaska.

[Check]

First National Bank of Fairbanks  
59-7

Fairbanks, Alaska Oct. 4, 1946.

Pay to the order of: W. R. Tucker.....\$ 12.00

Twelve dollars and no cents.....Dollars

/s/ L. D. COLBERT

Address: Fairbanks

[Stamped]: Paid 10/11/46.

[Reverse]

Stamped: Pay to the order of Any Bank or Trust  
Co. All prior endorsements guaranteed.  
Oct. 10, 1946. Bank of Fairbanks, 59-20,  
Alaska.

APPELLANT'S EXHIBIT H—(Continued)  
[COUNTER CHECK]

First National Bank of Fairbanks  
59-7

Fairbanks, Alaska Sept. 24, 1946.

Pay to the order of: N. C. Co.....\$ 14.39  
Fourteen dollars and 39 cents.....Dollars

/s/ L. D. COLBERT

Address: Fairbanks

[Stamped]: Paid 9/24/46.

[Reverse]

Stamped: Pay to the order of First National  
Bank of Fairbanks, Alaska. All pre-  
vious endorsements guaranteed for de-  
posit only. Northern Commercial Com-  
pany.

Statement of Account  
The First National Bank  
Fairbanks, Alaska

L. D. Colbert

Kindly Advice the Bank of Any Change in Address.

Please Examine at Once. If No Error Is Reported in Ten Days  
the Account Will Be Considered Correct.

				The Last Amount in This Column	
Date	Checks in Detail	Date	Deposits	Is Your Balance	
	Balance Brought Forward		Sept. 23, 1946	930.21	
Sept. 25/46	14.39—			Sept. 25/46	915.82*
Sept. 27/46	1.25—	1.60—		Sept. 27/46	912.97*
Sept. 28/46	10.00—			Sept. 28/46	902.97*
Sept. 30/46	500.00—			Sept. 30/46	402.97*
		Oct. 1/46	75.00	Oct. 1/46	477.97*
Oct. 2/46	20.00—			Oct. 2/46	457.97*
Oct. 5/46	34.00—			Oct. 5/46	423.97*
Oct. 11/46	12.00—			Oct. 11/46	411.97*

[Stamped]: Your Balance Oct. 15, 1946.

This Statement is furnished you instead of balancing your Pass Book. It saves you the trouble of bringing your Pass Book to the bank and waiting for it to be balanced. These statements will be found very convenient to check up and file. All items are credited subject to final payment.

Use Your Pass Book Only as a Receipt Book  
When Making Deposits.

## APPELLANT'S EXHIBIT I

### REAL MORTGAGE

This Indenture, Made this 1st day of December,  
1943, by and between:

Thelma D. Gregor, of Fairbanks, Alaska,  
party of the first party, hereinafter styled  
mortgagor; and

L. D. Colbert, of the same place, party of the  
second part, hereinafter styled mortgagee,

Witnesseth:

That the said party of the first part, for and in consideration of the sum of One Thousand Dollars (\$1000.00), lawful money of the United States of America, to her in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, convey, and confirm unto the said party of the second part, and to his heirs and assigns, forever, all the following-described real property, to-wit:

The south one-hundred thirty-seven (137) feet of Lot eighteen (18) in Block Two (2) of the Graehl Townsite in the Fairbanks Recording Precinct, Fourth Judicial Division, Territory of Alaska, according to the official map and plat of said Graehl Townsite.

The foregoing mortgage is intended as a mortgage to secure the payment by mortgagor to mortgagee on or before the 25th day of October, 1944, the sum of \$1000.00, together with the interest thereon at the rate of eight per cent (8) per annum, according to the terms and conditions of a certain promissory note of even date herewith in the words and figures following, to wit:

“Installment Note

\$1000.00

Fairbanks, Alaska, December 1, 1943

For value received, I promise to pay to the order of L. D. Colbert of Fairbanks, Alaska, one-thousand Dollars in Lawful Money of the United States of America, with interest thereon in like Lawful



Money at the rate of eight per cent per annum from date until paid, payable in monthly installments of not less than \$100.00 in any one payment, together with the full amount of interest due on this note at time of payment of each installment. The first payment to be made on the 25th day of January, 1944, and a like payment on the 25th day of each month thereafter until the whole sum, principal and interest to become immediately due and collectible at the option of the holder hereof. And in case suit or action is instituted to collect this note, or any portion thereof, I promise to pay such additional sum as the Court may adjudge reasonable as attorney's fees in said suit or action.

Due October 25, 1944, at Fairbanks, Alaska.

THELMA D. GREGOR."

This mortgage is also intended to secure, and does hereby secure, the payment of all liens, encumbrances, charges, and counsel fees herein mentioned, said counsel fees to become payable and be allowed if suit be commenced to foreclose this mortgage, and these presents shall be void of such payments be made according to the tenor and effect thereof; but, in case default be made in the payment of said principal sum or interest as hereinbefore provided, at the option of the said party of the second part, or his heirs or assigns, suit may be immediately brought and a decree be had to sell said premises, with each and every of the appurtenances, or any part thereof, in the manner prescribed by law; and out of the money arising from such sale, the prin-

principal and interest shall be retained by mortgage, together with the costs and charges of making such sale and of suit for foreclosure, including attorney's fees, and also the amounts, both principal and interest shall be retained by mortgages, together with the costs and charges of making such sale and suit for foreclosure, including attorney's fees, and also the amounts, both principal and interest, of all payments of liens and other encumbrances that may have been made by the said mortgagee by reason of the permission hereinafter granted; and the surplus, if any there be, shall be paid by the party making such sale, on demand, to the mortgagor herein, her heirs, executors, administrators, or assigns.

It is hereby agreed that the said party of the second part, or his heirs or assigns, may pay and discharge at maturity any and all liens and other encumbrances now subsisting, or hereinafter to be laid or imposed on said parcel of land and premises, excepting for taxes and other assessments levied or assessed on this mortgage or on the money secured hereby, and which may be in effect a charge thereon, and all such payments and interest shall be allowed with interest at the rate of eight per cent per annum, and such payments and interest shall be considered to be secured by these presents, and shall be a charge on said premises, payable on demand in the same money or currency in which the same may have been paid and may be deducted from the proceeds of the sale hereinabove authorized.

The terms and conditions of this mortgage shall

be binding on the said party of the first part, her heirs, executors, administrators, successors in interest, and assigns.

In Witness Whereof, the party of the first part has hereunto set her hand and seal the day and year first above written.

[Seal]    /s/ THELMA D. GREGOR.

In the presence of:

/s/ JUNE BROWN,

/s/ E. B. COLLINS.

United States of America,  
Territory of Alaska—ss.

This Is To Certify That on this the 1st day of December, 1943, the undersigned, a notary public in and for the Territory of Alaska, duly commissioned and sworn, personally appeared Thelma D. Gregor, to me known to be the identical individual mentioned in and who executed the within and foregoing mortgage, and she acknowledged to me that she signed and sealed the same freely and voluntarily for the uses and purposes therein specified.

Witness my hand and notarial seal the day and year in this certificate first written.

[Seal]    /s/ E. B. COLLINS,

Notary Public in and for the  
Territory of Alaska.

My Commission expires November 23, 1947.

Territory of Alaska,  
Fourth Judicial Division—ss.

Filed for record at request of L. D. Colbert on the 4 day of Dec., 1943 at 42 min. past 11 a.m. and recorded in Vol. 13 of Real Mtg., page 393. Fairbanks Recording District.

/s/ ELEANOR M. ELY,  
Recorder.

By /s/ FRANCIS P. BAKER,  
Deputy.

6/16/50.

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APPELLANT'S EXHIBIT J  
REAL ESTATE MORTGAGE

This Indenture, made and entered into this 22nd day of January, 1946, by and between Thelma Gregor Hayes, of Fairbanks, Alaska, party of the first part, and L. D. Colbert, of Fairbanks, Alaska, party of the second part,

Witnesseth:

That the said party of the first part, for and in consideration of the sum of Eighteen Hundred (\$1800.00) Dollars, to her in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell, convey, release and quitclaim unto the said party of the second part, his successors and assigns, all her right, title and interest, claim and demand, both at law and in equity, as well in possession as in expectancy if the said party of the first



part, of, in and to the following described property situate in the town of Fairbanks, Fourth Division, Territory of Alaska, to wit: *T.D.H Graehl.\**

All of Lot Nine (9) and the South Fifty (50) feet of Lot Six (6) in Block Three (3)

together with all and singular the tenement, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the rents, issues and profits thereof.

To Have and to Hold, all and singular, the said premises, together with the appurtenances, unto the said party of the second part and to his successors and assigns forever.

This conveyance is intended as a mortgage to secure the payment of the sum of Eighteen Hundred (\$1800.00) Dollars, in accordance with the words and tenor of a certain promissory note of even date hereof, in the words and figures as follows:

\$1800.00 January 22, 1946. On or before one year after date, without grace I promise to pay to the order of L. D. Colbert, Eighteen Hundred Dollars, for value received with interest from date at the rate of eight per cent per annum until paid. Principal and interest payable in lawful money of the United States at Fairbanks Alaska, and in case suit is instituted to collect this note or any portion thereof, I promise to pay such additional sum as the

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[\*In longhand on original.]



Court may adjudge reasonable as Attorney's fees in said suit.

THELMA GREGOR HAYES

No. . . . . Due Jan. 22, 1947.

The said party of the first part further agrees to pay all taxes and assessments that may be levied upon the said premises before the same shall become delinquent, and to keep the said buildings insured for the benefit of the said party of the second part in a sum not less than the amount secured by this mortgage, and to deliver the said policies of insurance to said party of the second part, with loss by fire, if any, payable to the said party of the second part as his interest may appear.

In case the said party of the first part fails to pay taxes or assessment before the same shall become delinquent, or to pay the insurance premiums for insurance on said buildings, said party of the second part or his assigns, may do so, and the amounts so paid, with interest at the rate of eight per cent per annum from date of payment shall be added to and deemed a part of the money secured by this mortgage.

Now if the sums of money due upon the said promissory note shall be paid according to the terms thereof, this conveyance shall be void; but in case default shall be made in payment of principal or interest as above provided, then the said party of the second part his successors or assigns, may sell the premises above described, with all and every of the appurtenances, or any part thereof in

the manner prescribed by law, and out of the money arising from such sale, retain the said principal and interest, together with the costs and charges of making such sale, and a reasonable sum as attorney's fees, and the overplus, if any there be, pay over to the parties of the first part, their heirs or assigns; and the said party of the first part, for herself, her heirs, executors and administrators, do covenant and agree to pay said party of the second part, the said sum of money as above mentioned.

In Witness Whereof the said party of the first part has hereunto set her hand and seal the day and year first above written.

THELMA GREGOR HAYES,  
Party of First Part.

Executed in the presence of:

/s/ GRADELLE LEIGH,

/s/ MARY McDONNELL.

United States of America,  
Territory of Alaska—ss.

This Is To Certify that before me, the undersigned, a Notary Public, personally appeared Thelma Gregor Hayes, to me personally known, and known to me to be the identical person who executed the above and foregoing instrument, and she acknowledged to me that she signed the same freely and voluntarily and for the purposes therein mentioned.

In Witness Whereof, I have hereunto set my

hand and affixed my official seal this 23rd day of January, 1946.

[Seal]     /s/ GRADELLE LEIGH,  
Notary Public for Alaska.

My Commission expires 11/7/48.

99471

Territory of Alaska,  
Fourth Judicial Division—ss.

Filed for record at request of L. D. Colbert on the 23 day of January, 1946, at 16 min. past 1 p.m. and recorded in Vol. 14 of Real Mtgs., page 393. Fairbanks Recording District.

/s/ ELEANOR M. ELY,  
Recorder.

6/16/50.

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APPELLANT'S EXHIBIT K

Receipt

July 6, 1946

Received from Thelma Hayes Twelve Hundred Twenty Four Dollars for payment in full with interest on Graehl Circle Bar Mortgage.  
\$1224.00 paid in full.

/s/ L. D. COLBERT.

APPELLANT'S EXHIBIT L

Emma Colbert

609 East 23rd Street, Indianapolis, Indiana

February 21, 1947

Dear Brother Louis:

Thank you so much for the lovely valentine which added much to my 80th birthday enjoyment.

My birthday was well celebrated with cards, letters, flowers and gifts from relatives and friends.

I had two birthday dinners and two birthday cakes—so you see I fared well.

Belli came to get the birthday dinner on the 15th and Vic had ordered a specially decorated cake. The table was set for eight and the six guests were old friends who used to live in Wabash. You would remember Clara Hess Warmoth, Lyle and Jean Hartio, Daise Henley, Helen Watson and Eva Mackey Whitcraft.

On Sunday the Buell family who used to live on Mr. Henay's farm came for another birthday dinner. They have two grown-up daughters now. Betty Buell baked me a special birthday cake so we had that on Sunday. My friends Mr. and Mrs. MacKinsey were here too, so we had another party of eight.

One of my friends sent a beautiful flower centerpiece for the dining table.

The Eckhart family sent me a lovely blooming plant and the little boys made the valentines they sent.

I had a nice check from Anna Lou and books, aprons, candy and other gifts from various friends.

I hope you may have just as happy a time when you get to be eighty.

I hope you are getting well and that you will soon be able to be about as usual.

I am grateful to Mrs. Hayes for looking after you and want her to know how much I appreciate her efforts. I am pleased to know that she helps you to remember me.

Best love to you from Vic and

Your Devoted Sister,

/s/ EMMA

6/16/50

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[Envelope]

[U. S. 5 Cent Stamp]

[Postmark]: Indianapolis, Ind., Feb 21, 1947

[Addressee]: Mr. Louis Dale Colbert, Box 730,  
Fairbanks, Alaska



APPELLANT'S EXHIBIT M

AFFIDAVIT OF RENEWAL OF CHATTEL  
MORTGAGE

United States of America,  
Territory of Alaska,  
Fourth Judicial Division,  
Fairbanks Precinct—ss.

L. D. Colbert being first duly sworn on oath deposes and says: That he is the owner and holder of a certain chattel Mortgage made by Thelma Gregor Hayes, and that he hereby makes and files this affidavit of renewal of said chattel mortgage in his own behalf.

That on the 28th day of August, 1944, the said Thelma Gregor Hayes, as mortgagor, made and executed to this affiant as mortgagee, a certain chattel mortgage, being instrument No. 95878, and being recorded in Fairbanks Precinct on August 29, 1944.

That said chattel mortgage, No. 95878, was filed for record in the office of the Recorder of Fairbanks Precinct, as a chattel mortgage, on the said 29th day of August, 1944; That said instrument sets forth a certain promissory note of the said mortgagor to the mortgagee for the sum of five hundred (\$500.00) Dollars, bearing interest at the rate of eight per cent per annum, due August 28, 1945, for the payment of which the said principal sum and interest the said chattel mortgage was made, executed and delivered to the said mortgagee as security.

That this affiant as the said mortgagee is now the owner and holder of said note, and of said chattel

mortgage and that the interest of this affiant as mortgagee in the property described in said chattel mortgage at the time this affidavit is made is the sum of Five Hundred (\$500.00) Dollars with interest thereon at eight per cent per annum from June 23, 1945, and the said principal sum and interest is now due, owing and unpaid from the said mortgagor to this affiant as mortgagee, and this affiant as mortgagee has and holds a lien upon all of the personal property described in the said chattel mortgage above mentioned for the payment of the said sum of Five Hundred (\$500.00) Dollars with interest thereon at the rate of eight per cent per annum from June 23, 1945.

That this affidavit is made for the purpose of renewing the said chattel mortgage and continuing the lien thereof upon all of the said personal property described in said instrument for the further period of one year, in accordance with the provisions of section 2883 of the compiled laws of Alaska, 1933, and amendments thereto relating to the renewal and duration of chattel mortgage liens.

/s/ L. D. COLBERT.

Subscribed and Sworn to before me this 18th day of September, 1945.

[Seal] /s/ MAURICE T. JOHNSON,

Notary Public for the Territory of Alaska.

My Commission expires April 27, 1948.

6/16/50.

APPELLANT'S EXHIBIT N  
CONTRACT AND AGREEMENT

This Contract and Agreement, made and entered into on this 23rd day of September, 1946, by and between L. D. Colbert, of Fairbanks, Alaska, first party, and Thelma D. Hayes, of the same place, second party,

Witnesseth:

Whereas first party is the owner of that certain Judgment in the District Court for the Territory of Alaska, Fourth Division, in which Walter B. Allison, Jr., is the plaintiff, and Thelma D. Gregor is defendant, No. 5173, and upon which there is now due and owing the sum of Three Thousand Five Hundred and Fifty-six Dollars and Thirty-nine Cents (\$3,556.39), and whereas said first party caused a special execution issued on the 26th day of August, 1946, for the sale of said real property of second party, and whereas first party has agreed to instruct the United States Marshal for the Fourth Division, Territory of Alaska, to return said Writ without sale, Now, Therefore, it is mutually understood and agreed as follows:

I.

That second party will pay to first party the sum of Six Hundred Dollars (\$600.00) upon the execution of this agreement as part payment upon said Judgment, and will pay in addition thereto the

costs incurred amounting to the sum of Twenty-two Dollars (\$22.00).

## II.

Second party promises and agrees to pay to first party the sum of Two Hundred Dollars (\$200.00) per month and every month until the full amount of said Judgment has been fully paid, and in addition to said payments of Two Hundred Dollars (\$200.00) per month, said party promises to pay to said first party an additional sum of Three Hundred Dollars (\$300.00) to be applied upon said Judgment on the 1st day of January, 1947.

## III.

First party promises and agrees that he will not cause an execution to be issued as long as said second party makes said payments as hereinabove provided, and will not cause an execution to be issued in the above-entitled action unless said second party defaults or refuses to pay any payments upon said Judgment as hereinabove provided.

## IV.

Said first party hereby acknowledges receipt of the payment of Six Hundred Dollars (\$600.00) to be applied on said Judgment, together with the sum of Twenty-two Dollars (\$22.00) paid by second party as the amount of the costs agreed herein to be paid by said second party.



In Witness Whereof the parties have hereunto set their hands this 23d day of September, 1946.

/s/ L. D. COLBERT,  
First Party.

/s/ THELMA D. HAYES,  
Second Party.

Executed in the Presence of:

/s/ JULIEN A. HURLEY,

/s/ PEGGY E. LYLE.

United States of America,  
Territory of Alaska,  
Fourth Division—ss.

Be It Remembered that on this, the 23rd day of September, 1946, before me, the undersigned, a Notary Public in and for the Territory of Alaska, duly commissioned and sworn, personally came L. D. Colbert and Thelma D. Hayes, known to me to be the identical individuals named in and who executed the foregoing Contract and Agreement; and each of them acknowledged to me that he did so freely and voluntarily, for the uses and purposes therein set forth.

In Witness Whereof, I have hereunto set my hand and Notarial Seal on the day and year hereinabove first written.

/s/ JULIEN A. HURLEY,  
Notary Public in and for the  
Territory of Alaska.

My Commission expires: June 12, 1949.

6/16/50.



## APPELLEE'S EXHIBIT No. 1

[Check]

First National Bank of Fairbanks

59-7

No. 2

Fairbanks, Alaska Oct. 17, 1946.

Pay to the order of: Brown Jewelry

Store .....\$ 17.17

Seventeen dollars and 17 cents.....Dollars

/s/ L. D. COLBERT

By /s/ THELMA D. HAYES,

Attorney in Fact.

Address: Fairbanks

[Stamped]. Paid 10/19/46.

[Reverse]

Stamped: Arthur S. Brown

[Endorsed]: /s/ L. D. COLBERT

[Check]

First National Bank of Fairbanks

59-7

No.1

Fairbanks, Alaska October 16, 1946.

Pay to the order of: Cash.....\$100.00

One hundred dollars and no cents.....Dollars

/s/ L. D. COLBERT

By THELMA D. HAYES,

Attorney in Fact.

Address: Fairbanks

APPELLEE'S EXHIBIT No. 1—(Continued)  
[Stamped]: Paid 10/19/46.

[Reverse]

/s/ ALBERT BERNARD

[Check]

First National Bank of Fairbanks  
59-7

No. 3

Fairbanks, Alaska Oct. 18, 1946.

Pay to the order of: Cash.....\$100.00  
One hundred dollars and no cents.....Dollars

/s/ L. D. COLBERT

By /s/ THELMA D. HAYES,  
Attorney in Fact.

Address: Fairbanks

[Stamped]: Paid 10/19/46.

[Counter Check]

First National Bank of Fairbanks  
59-7

No. 1

Fairbanks, Alaska Oct. 22, 1946.

Pay to the order of: Cash.....\$100.00  
One hundred dollars and no cents.....Dollars

/s/ L. D. COLBERT

By THELMA D. HAYES,  
Attorney in Fact.

Address: Fairbanks

APPELLEE'S EXHIBIT No. 1—(Continued)  
 [Stamped]: Paid 10/22/46.

[Reverse]

[Endorsed]: /s/ THELMA D. HAYES

[Counter Check]

First National Bank of Fairbanks  
 59-7

No. 1

Fairbanks, Alaska Oct. 30, 1946.

Pay to the order of Livesley's Men's

Shop .....\$ 40.00

Forty dollars and no cents .....Dollars

/s/ LOUIS D. COLBERT

By /s/ THELMA D. HAYES,  
 Attorney in Fact.

Address: Fairbanks

[Stamped]: Paid 10/31/46.

[Stamped]: For deposit Oct. 31. Livesley's Men's  
 Shop. Per B. E.

## APPELLEE'S EXHIBIT No. 1—(Continued)

Statement of Account  
The First National Bank  
Fairbanks, Alaska

L. D. Colbert

Kindly Advise the Bank of Any Change in Address.

Please Examine at Once. If No Error Is Reported in Ten Days  
the Account Will Be Considered Correct.

Date	Checks in Detail	Date Deposits	The Last Amount in This Column Is Your Balance
	Balance Brought Forward	Oct. 15, 1946	411.97
Oct. 19/46	17.17— 100.00—	100.00—	Oct. 19/46 194.80*
Oct. 22/46	100.00—		Oct. 22/46 94.80*
Oct. 31/46	40.00—		Oct. 31/46 54.80*

[Stamped] : Your Balance Nov. 1, 1946.

This Statement is furnished you instead of balancing your Pass Book. It saves you the trouble of bringing your Pass Book to the bank and waiting for it to be balanced. These statements will be found very convenient to check up and file. All items are credited subject to final payment.

Use Your Pass Book Only as a Receipt Book  
When Making Deposits.

[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, John B. Hall, Clerk of the above-entitled Court,  
do hereby certify that the following list comprises  
all proceedings as per designation of Record filed  
by Appellant in the above-entitled cause viz.:

Page

- Appeal Papers, Probate Court to  
District Court  
Petition for Probate of Will..... 1  
Affidavit in support of above petition.. 3

Last Will and Testament of Louis D. Colbert .....	4
Affidavit of Subscribing Witness James F. Haynes .....	6
Affidavit of Subscribing Witness V. A. Cabbell .....	8
Petition to Revoke Letters Testa- mentary and Grant them to per- son having Prior Right .....	9
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Witness my hand and the seal of the above-en-  
titled Court, this 8th day of December, 1950.

[Seal] /s/ JOHN B. HALL,  
Clerk of the District Court, Fourth Judicial Divi-  
sion, Territory of Alaska.

---

[Endorsed]: No. 12771. United States Court of  
Appeals for the Ninth Circuit. Thelma D. Hayes,  
Appellant, vs. First National Bank of Fairbanks,  
Executor of the Estate of Louis D. Colbert, de-  
ceased, Appellee. Transcript of Record. Appeal  
from the District Court for the Territory of Alaska,  
Fourth Division.

Filed December 15, 1950.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

In the United States Court of Appeals for the  
Ninth Circuit  
No. 12771

In the Matter of

The Estate of LOUIS D. COLBERT, Deceased,  
FIRST NATIONAL BANK OF FAIR-  
BANKS, Executor.

To: The Clerk of the United States Court of  
Appeals for the Ninth Circuit

### DESIGNATION OF RECORD

The appellant hereby designates by reference to the pages of the original certified record the following portions of said record which are material to the consideration of this appeal:

	pp.
Petition For Probate of Will.....	1-2
Affidavit in Support of Probate of Will.....	3
Last Will and Testament of Louis D. Colbert.	4-5
Affidavit of Subscribing Witness.....	6-7
Affidavit of Subscribing Witness.....	8
Petition to Revoke Letters Testamentary and Grant Them to Person Having Prior Right	9-10
Answer of the First National Bank of Fair- banks, Alaska to the Petition to Revoke Their Letters Testamentary and to Appoint Thelma D. Hayes as Executor of Said Estate .....	11-13
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Finding of Facts & Conclusions of Law.....	18-19
Judgment .....	20-21
Exceptions .....	22-23
Notice of Appeal.....	24
Order .....	36
Notice of Appeal.....	37
Designation of Record.....	38

Certified Transcript of Testimony and Proceedings before District Court as Numbered by District Court Reporter, pp. 1-53.

The Following Exhibits and Portions of Exhibits:  
Appellant's Exhibit A-1.

The Following Documents from Appellant's Exhibit A:

Judgment, Findings of Fact and Conclusions of Law; Motion for Continuance together with supporting affidavit by Chas. J. Clasby and the letters attached thereto; Petition for Appointment of Guardian to Take Care, Custody and Management of the Estate of Louis D. Colbert, an Incompetent and Incapable Person;

The Following Document from Appellant's Exhibit B:

Will of Louis D. Colbert.

The Following Document from Appellant's Exhibit C:

Last Will and Testament of Louis D. Colbert.

Appellant's Exhibits D, E, F, G, H, I, J, K, L, M, N, and Appellee's Exhibit I.

/s/ WARREN A. TAYLOR,  
Of Attorneys for Appellant.

Filed Dec. 12, 1950.

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[Title of Court of Appeals and Cause.]

To: The Clerk of the United States Court of  
Appeals for the Ninth Circuit

### STATEMENT OF POINTS

The appellant states that the points upon which she intends to rely on this appeal are as follows:

1. That the District Court erred in ordering the appellant's Exceptions to the Findings of Facts, Conclusions of Law and Judgment of the Probate Court overruled and in ordering approval, sustainment and adoption of said Findings of Fact, Conclusions of Law and Judgment of said Probate Court. (Findings of Fact and Conclusions of the Probate Court appear at pages 18 and 19 of the original certified record. That said Judgment of the Probate Court appears at pages 20 and 21 of said original certified record. That said District Court's Order overruling and adopting appears at page 35 of said original certified record.)

2. That said District Court's order of approval and adoption was contrary to the weight of evidence and to the law.

3. That said District Court erred in finding that Louis D. Colbert did not possess testamentary capacity at the time of executing his Will of October 22, 1946, and that said finding was contrary to the evidence and to the law.

/s/ WARREN A. TAYLOR,

Of Attorneys for Appellant.

[Endorsed]: Filed Dec. 12, 1950.



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## ORIGINAL ARTICLES

THE EFFECT OF VITAMIN DEFICIENCY ON THE GROWTH OF THE RAT  
J. H. HOLLAND, JR., and J. H. HOLLAND, JR., JR.  
The effect of vitamin deficiency on the growth of the rat was studied by feeding a diet deficient in vitamins A, B, and C. The results showed that the growth of the rat was retarded and the body weight was reduced.

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No. 12,771

IN THE

United States Court of Appeals  
For the Ninth Circuit

---

THELMA D. HAYES,

*Appellant,*

VS.

FIRST NATIONAL BANK OF FAIRBANKS,  
Executor of the Estate of Louis D.  
Colbert, deceased,

*Appellee.*

Appeal from the United States District Court for the  
Territory of Alaska, Fourth Division.

BRIEF FOR APPELLANT.

---

J. L. MCCARREY, JR.,

Anchorage, Alaska,

WARREN A. TAYLOR,

Fairbanks, Alaska,

*Attorneys for Appellant.*

FILED

APR 14 1951



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No. 12,771

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

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THELMA D. HAYES,

*Appellant,*

vs.

FIRST NATIONAL BANK OF FAIRBANKS,  
Executor of the Estate of Louis D.  
Colbert, deceased,

*Appellee.*

Appeal from the United States District Court for the  
Territory of Alaska, Fourth Division.

**BRIEF FOR APPELLANT.**

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**JURISDICTIONAL STATEMENT.**

Jurisdiction of the Probate Court is based upon Alaska Compiled Laws Annotated (1949), Section 52-1-1. Jurisdiction of the District Court is based upon Alaska Compiled Laws Annotated (1949), Sections 64-1-1 and 53-1-1, and 48 U. S. C. Section 101 (Territories and Insular Possessions). The U. S. Court of Appeals for the 9th Circuit has jurisdiction under the provisions of 28 U. S. C. Section 225, subdivision (a), First and Third, and subdivision (d).

**STATEMENT OF THE CASE.**

Mr. Louis D. Colbert, also more commonly known as Lou Colbert, died in the hospital at Fairbanks, Alaska, about the 25th day of May, 1947, (T.R. 179), having left three Last Wills and Testaments, the first one dated the 14th day of November, 1938, (T.R. 276); the second one dated the 22nd day of October, 1946, (T.R. 280-281), which was witnessed by two witnesses; and a third one, also dated the 22nd day of October, 1946, witnessed by three witnesses, (T.R. 278-279).

On the 23rd day of October, 1946, while the Testator, Louis D. Colbert, was in the Fairbanks General Hospital recuperating from arteriosclerosis, more commonly known as hardening of the arteries, (T.R. 194), Mr. Frank P. DeWree, as Trust Officer for the First National Bank of Fairbanks, Alaska, filed a petition for the appointment of guardian to take care, custody and management of the estate of Louis D. Colbert, an incompetent and incapable person, and the same was filed in the Probate Court for Fairbanks Precinct of the Fourth Judicial Division of the Territory of Alaska, on the same day and is known as Docket 1114. (T.R. 272 etc.)

On the 15th day of November, 1946, the U. S. Commissioner and ex-Officio Probate Judge, Eleanor M. Ely, decreed the said Louis D. Colbert to be an incompetent person and so executed a judgment on the same day, which was filed in the Probate Court on the 19th day of November, 1946, (T.R. 263). While the Testator, Mr. Colbert, had received notice of the hearing upon the petition to declare him an incompe-

tent, he was not personally present, nor was he represented by an Attorney, although Mr. Chas. J. Clasby and Mr. E. B. Collins, associated Attorneys at Law, in the City of Fairbanks had correspondence with Mr. Colbert in the hospital and had also asked for a continuance, (T.R. 267-269). Therefore, Mr. Colbert was declared incompetent *in absentia*. While it appears that the petition of the First National Bank, for the probating of the Will of Louis D. Colbert, which was executed on the 14th day of November, 1938, was not made a part of the record of the case, the Will was filed in the Probate Court for the Fairbanks Precinct, Fourth Division of the Territory of Alaska, by the First National Bank, on the 27th day of May, 1947, possibly prior to his burial, or immediately thereafter at the latest possible date, and Letters Testamentary were issued to the First National Bank of Fairbanks as Executor of said Will on the 27th day of May, 1947, (T.R. 275, 276, 277).

On the 9th day of June, 1947, Thelma G. Hayes executed her petition for the probate of the Will, which was witnessed by three witnesses, as aforesaid, and filed the same on the 11th day of June in the Probate Court for the Fourth Division of the Territory of Alaska, which is known as Case No. 1145. Thereafter the affidavits of the subscribing witnesses to the third Will, James F. Haynes, V. A. Cabbell and of the Attorney, Warren A. Taylor, who prepared the Will, filed with the petition of Thelma G. Hayes to probate, were filed in Probate Court on the 6th day of August, 1947.

On the 1st day of August, 1947, Thelma G. Hayes filed a petition to "Revoke Letters Testamentary and Grant Them to Persons Having a Prior Right", (T.R. 13-14), in contest to the Letters Testamentary which had been granted to the First National Bank of Fairbanks, Alaska, requesting revocation of Letters Testamentary, which had been previously granted to the First National Bank, and on the 18th day of August, Edward H. Strocker, President of the First National Bank, (T.R. 15-16-17), filed his Answer to the petition of Thelma G. Hayes (which incidentally was signed by Chas. J. Clasby, along with Julian A. Hurley, as Attorneys for the First National Bank, yet Chas. J. Clasby, being one of the Attorneys Louis D. Colbert had requested to represent him in a guardianship proceedings, hereinafter set forth said, "By reasons of other commitments to other clients, it is impossible to properly prepare and present a defense for said Louis D. Colbert; \* \* \*". The Affiant, from conversations with Mr. Collins and other Attorneys is silently familiar with issues of this case and from such familiarity, states that issues are such that will require considerable preparation by an Attorney in order to adequately present a defense for the said Louis D. Colbert) (T.R. 267-268-269). In said answer the First National Bank of Fairbanks, Alaska, admitted that a pretended Will had been executed by the decedent on the 22nd day of October, 1946, and that the same had been filed in the Probate Court. He also admitted that Thelma G. Hayes, the petitioner, was named as Executrix of said Will, but denied that



Thelma G. Hayes had the prior right to Letters Testamentary upon said estate and then, by way of an affirmative answer and defense, the First National Bank alleged, in substance, that for a long time prior to the pretended Will made by the Decedent, Louis D. Colbert on the 22nd day of October, 1946, that he was not of sound and disposing mind and memory and he was unable to comprehend the purpose or nature of the business that was being transacted, or the purpose or consequences of signing of a Will, and then alleged on the 23rd day of October, 1946, a petition had been filed by the First National Bank, requesting they be appointed Guardian of said Louis D. Colbert, and his property on account of him not being of sound and disposing mind and memory, and that on the 15th day of November, 1946, the First National Bank of Fairbanks was appointed and qualified as Guardian; then for a second and further defense and affirmative answer to the petition of Thelma G. Hayes, the answer alleges that the signature of Louis D. Colbert on said purported will was not the free and voluntary act and deed of the said Louis D. Colbert and the said Will was not signed by the claimed attesting witnesses at the request of the said Louis D. Colbert, or in his presence, or in the presence of each other, and then prayed that Letters Testamentary, heretofore issued to the First National Bank of Fairbanks be not revoked and Letters Testamentary be not granted to said Thelma G. Hayes, and that her petition be dismissed and that the First National Bank recover from the petitioner, Thelma G.



Hayes, its costs and disbursements and for such other relief as is just and equitable in the premises, (T.R. 15-16-17-18). The above answer was filed on the 18th day of August, 1947, and on the 1st day of October, 1947, Thelma G. Hayes, although the petition was signed, Thelma D. Hayes, but Thelma D. and Thelma G. Hayes being one and the same individual, her real name being Thelma Gregor Hayes, (T.R. 142), replied to the answer of the First National Bank by denying paragraphs I and II of the affirmative answer and defense of the First National Bank and then replied to the second and separate and affirmative defense, of the First National Bank, by denying each and every allegation contained therein and prayed for the relief demanded in her petition filed on the 11th day of June, 1947, as aforesaid, (T.R. 18-19-20). In the interim, and on the 6th day of August, 1947, the affidavit of the subscribing witnesses, James F. Haynes and V. A. Cabbell, together with the affidavit of Warren A. Taylor, Attorney at Law, who had prepared the third Will signed by Louis D. Colbert on the 22nd day of October, 1946, which had the three witnesses, filed his affidavit setting forth the fact that Louis D. Colbert was of sound and disposing mind and memory, in possession of his faculties and not acting under duress, fraud or undue influence of any person whomsoever, (T.R. 6-7). While the affidavits of James F. Haynes and V. A. Cabbell, (T.R. 10-11-12), stated that they knew the Testator, Louis D. Colbert on the 22nd day of October, 1946, (which was the day the Last Will and Testament of the decedent was

made, which was filed on the 11th day of June, 1947, (T.R. 7-8-9), and that they knew the witnesses, V. A. Cabbell, James F. Haynes and Arthur A. Benz, in whose presence the said Testator, Louis D. Colbert signed, and that he, (Testator), requested the witnesses to attest and sign the same as witnesses, and that said Arthur A. Benz, V. A. Cabbell, and James F. Haynes then and there, in the presence of the Testator and in the presence of each other subscribed as witnesses to said instrument. The affidavits also state that the Testator was over eighteen (18) years of age and was, in fact, seventy-two (72) years, or thereabouts and of sound and disposing mind, not acting under duress, menace, fraud undue influence or misrepresentation.

Based upon the foregoing resume of the Wills and the pleadings, the hearing on the petition of Thelma G. Hayes before the Hon. Clinton B. Stewart, U. S. Commissioner and ex-Officio Probate Judge, was commenced on the 16th day of June, 1950, in which hearing the Probate Court found for the First National Bank and against the said petitioner, Thelma G. Hayes, (T.R. 23).

Thereafter exceptions were taken by the said Thelma G. Hayes by and through her Attorneys, Warren A. Taylor and J. L. McCarrey, Jr., (T.R. 26), and Notice of Appeal was filed by Warren A. Taylor, one of the Attorneys for the Appellant on the 30th day of June, 1950.

Pursuant to said Notice of Appeal, the case was appealed to the U. S. District Court for the Fourth Division for the Territory of Alaska, under case No. 6515, and was set for hearing on the 5th day of September, 1950, at which time a transcript of the record, which was prepared by Charles Belida, the duly appointed Court Stenographer for the U. S. District Court for the Fourth Judicial Division of the Territory of Alaska, at Fairbanks, Alaska, who had taken the proceedings and made a transcript thereof in the Probate Court, without objection, was admitted and made a part of the hearing in the case No. 6515, as aforesaid, marked Exhibit "A", which is also sometimes known as Appellant's Exhibit "A-1", (T.R. 61), and while the Designation of Record, prepared by Warren A. Taylor, one of the Attorneys for Thelma G. Hayes, specifically requests the Clerk of the District Court for the Fourth Division of the Territory of Alaska:

"You are hereby requested to prepare, certify and transmit to the Clerk of the United States Court of Appeals for the Ninth Circuit with reference to the Notice of Appeal heretofore filed by Thelma D. Hayes in the above cause, the entire transcript of record in the above cause, prepared and transmitted as required by law and by rules of said Court", (T.R. 30),

a rather thorough check of the transcript of the record printed by Phillips & Van Orden Co., of San Francisco, California, does not disclose that the Judgment which was appealed from by Thelma G. Hayes,

in her Notice of Appeal filed on the 3rd day of November, 1950, to the Circuit Court of Appeals, was ever transmitted, although the Notice of Appeal specifically states:

“Notice is hereby given that Thelma D. Hayes hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order of the above-entitled Court overruling the exceptions of the said Thelma D. Hayes to the Judgment and Findings of the Probate Court for the Territory of Alaska, Fourth Division, Fairbanks Precinct, dismissing the said Thelma D. Hayes Petition to Revoke Letters Testamentary and grant them to persons having prior right and sustaining the findings of fact, conclusions of law and judgment of said Probate Court and entered in this action on the 4th day of October, 1950, and amended on the 1st day of November, 1950”, (T.R. 29-30).

Thus, it is from the Judgment entered in case No. 6515 before the Hon. Harry E. Pratt, District Judge of the U. S. District Court for the Fourth Judicial District of the Territory of Alaska, at Fairbanks, Alaska, that the said Thelma G. Hayes is appealing her petition for the Probate of the Third Will made, but the Second one executed by Louis D. Colbert on the 22nd day of October, 1946.



### QUESTION OF LAW.

A resume of the foregoing pleadings very clearly sets forth the pertinent facts to be considered by the U. S. Court of Appeals for the Ninth Circuit, and has resolved itself into one single question and that is:

“Was the Testator, Louis D. Colbert, at the time he signed his Third Will, referred to in this case, and dated the 22nd day of October, 1946, which was witnessed by three witnesses, ‘of sufficient mind and memory to remember the natural objects of his bounty, to have in his mind his separate items of property, and to make a disposition of it according to some plan formed in his mind, which is not affected by some operating insane delusion’?”

“In Re Smith’s Estate, 200 Calif. 152, 252 Pac. 325;

Dowdey-vs-Palmer, 122 N. E. 102;

Dosenback-vs-Reidhorns Exrx., 53 S.W. 2nd, 731;

Halton’s Estate, 161 Atl. 809;

Delmar’s Will, 152 N. E. 448;

Weaver’s Estate, 211 N. W. 130;

Forsman’s Estate, 30 Pac. 2nd, 941.”

---

### THE EVIDENCE.

The Testator, Louis D. Colbert, came to the Territory of Alaska some twenty or thirty years ago and engaged in mining, loaning money and allied business enterprises and was considered by all witnesses to be a very interesting, educated and “keen” man, (T.R. 100, 102, 127, 128, 237, 246). During the summer of



1946 his health began to wane and he found it difficult to take care of himself properly, in that his shoulder and legs became stiff and he found it very difficult to get around and he was developing general arteriosclerosis, (T.R. 146, 190, 191, 244, 245).

There is some doubt as to just why he went to the hospital, for Thelma G. Hayes stated that it was "at my request" that he went to the hospital and further, "I suggested that he go to the hospital and help him get better faster", (T.R. 148). While at T. R. 191, Dr. Arthur J. Schaible, the Testator's physician at that time, recommended on the 8th day of October, that since he was not doing too well and since "his odor was offensive to people in the waiting room so I recommended he go to the hospital", but be that as it may, it is undisputed by both the appellant and appellee that he entered the hospital on the 9th day of October, 1946. The appellant concedes that the appellee, through the testimony of Dr. Arthur J. Schaible, Andrew Nerland, Mike Stepovich, Julian A. Hurley and Harvey Van Hook, when the Testator first entered the hospital at Fairbanks, Alaska, that he was severely besmitten with pain and that at intervals he was plagued with a wandering of the mind which Dr. Schaible described as "well, he was disoriented. His memory was very, very poor. He—his reasoning was affected", also that he had hallucinations (T.R. 192, 210, 214, 239). However, there is no evidence of any of the witnesses that the appellee, including that of the Doctor who testified, that they saw the Testator on the 22nd day of October, 1946, or the date that

the Testator made his Third and Last Will and Testament. Even the testimony of Mr. Julian A. Hurley, who testified at (T.R. 238), that he and a Mr. Harvey Van Hook went over to visit Lou Colbert, "after the 17th of October and prior to the 23rd day of October, I don't remember the exact date, but it was between those days . . .", is placed in doubt, as that being the exact time he visited Louis D. Colbert for the reason that the man who went over with him, (and who Mr. Hurley testified went over with him, and who was later called as a witness) testified himself (T. R. 250), "yes, I was over there just two or three days after he went to the hospital. He was there and I went over to see him and you, (meaning Julian A. Hurley, who was the Attorney then asking Van Hook the questions) went with me too", (T.R. 250). Since, as aforesaid, Dr. Schaible, testifying from notes, stated that Colbert went to the hospital on the 9th (T.R. 191), Dr. Schaible's notes also disclosed that he saw the Testator on the 17th but not on the 19th; that he saw the Testator on the 20th, also on the 25th, and then corrected himself to say he did not see him on the 25th, but the Doctor definitely did not testify that he saw the Testator on the 22nd (T.R. 204). Hence, there is no evidence of any of the witnesses, including, but not limiting it to the appellee's witness, Dr. Schaible, who saw the Testator on the 22nd day of October, 1946, and since his record discloses that he did not see him on the 19th or again on the 25th, there is an insurmountable inference raised that Dr. Schaible did not see the Testator on the 22nd,

for had he done so, most certainly the appellees would have introduced those records in evidence, or at least would specifically have asked the Doctor to testify whether or not the records disclose that he saw the Testator on the 22nd day of October. Nevertheless, the appellant's witnesses, consisting of James F. Haynes (T.R. 41), Arthur A. Benz (T.R. 98, 99), Thelma G. Hayes (T.R. 166), and Warren A. Taylor (T.R. 108), all testified that they did, in the presence of one another see the Testator and, in addition thereto, the affidavit of V. A. Cabbell appears un rebutted, that he likewise saw the Testator on the 22nd day of October, 1946 and was present at the time the Testator signed the Will and was also present at the time the witnesses signed the Will, who all signed in the presence of the Testator (T.R. 11, 12). In addition thereto, it is testified by Thelma G. Hayes and corroborated by Arthur A. Benz, that nurses were present (T.R. 100, 169).

The evidence further discloses that the Testator met Thelma G. Hayes first in the year, 1937 (T.R. 142), and that from that date until the time of his death, they were very close friends and that, as a matter of fact, Mrs. Cecilia H. Gregor, Mother of Thelma G. Hayes testified that Mr. Colbert “. . . he was just like a father to her”, and further that it was more than an acquaintanceship, it was “a friendship”, (T.R. 140). Mrs. Cecilia H. Gregor further testified that she personally had known Mr. Colbert since Christmas night, 1938, (T.R. 132), and that Mr. Colbert was a very good friend of her husband (T.R.



133), and that she personally saw Mr. Colbert over at Thelma's place many times (T.R. 133); that he loaned her money (T.R. 134), and that Mr. Colbert attended the funeral of Mr. Gregor, which was on the 9th day of February, 1947 (T.R. 136).

It is of signal significance that the evidence discloses that the First National Bank of Fairbanks, Alaska, filed a petition in the Probate Court to declare the Testator incompetent on the 23rd day of October, 1946 (T.R. 272, 274), just one day after the Testator had executed his Will to Thelma G. Hayes, particularly in the light of the fact that the original Will, which the First National Bank sought to have admitted for probate on the 27th day of May, 1947 (T.R. 276-277), specifically provided, "No. 3. I do hereby nominate, constitute and appoint the First National Bank of Fairbanks, Alaska, the Executor of this, my Last Will and Testament", and further, it is noteworthy that after the Trust Officer, Frank DeWree (T.R. 220), was appointed Guardian over the property and estate of Louis D. Colbert, that neither he nor the President of the Bank, Mr. Edward H. Stroeker, went over to visit Mr. Colbert to care for his needs or to ascertain what his estate was comprised of. Conversely, it is noteworthy to find abundant evidence throughout the entire trial of the case, that Thelma G. Hayes cared for him a long time before he went to the hospital, recommended that he go to the hospital and then visited him daily after he went to the hospital and then took him into her own home and provided him with the very best accommodations one

could ask for, including good meals, up until a day or two before he died. (T.R. 148), (John Cetkovich T.R. 126-127; Arthur A. Benz T.R. 93-94). In fact, Mr. Cetkovich, at page 130 testified on re-direct examination that Mr. Colbert said "he would rather die here in this place than go over there and die." "That is the very words he spoke to me". He further testified that Mrs. Hayes had a Doctor come to his house and she wanted him to go to the hospital a couple of days before he went, but he refused to go (T.R. 130).

A letter dated the 21st day of February, 1947, from his sister, Emma Colbert, appellant's Exhibit "L" (T.R. 303), indicates that she is appreciative of what Thelma G. Hayes was doing for him, inasmuch as she states, "I am grateful for Mrs. Hayes for looking after you and want her to know how much I appreciate her efforts. I am pleased to know that she helps you to remember me."

Thus, the preponderance of the evidence conclusively proves, that the Testator and Thelma G. Hayes were the best of friends, although not of worldly or untoward personal nature, (T.R. 140) from 1937 until the time of his death, on or about the 25th day of May, 1947.

The evidence of the relationship between the Testator and the First National Bank and its officers is, that Mr. Stroeker, its President, had known the Testator for some twenty or thirty years (T.R. 230). Mr. Stroeker further testified that "Lou" made loans and



seemed to make out all right and in answer to a question, "Did he seem to be a pretty bright man?" he answered, "Yes, he was not a weak man. He was a fairly bright man." (T.R. 232), which corroborated other witnesses, as hereinbefore set forth, that Mr. Colbert was an intelligent man. There was one thing significant in the testimony of Mr. Edward H. Stroeker, and that is, he sought to belabor decedent about the fact that Lou, when he came to see him just before he went to the hospital, (T.R. 232), "did not know much about mortgages and things relative to real and chattel mortgages and insurance and things of that kind and he didn't seem to understand anything at all about it and he said, 'My Attorney knows.' I said, 'Lou, that has nothing to do with it. You should know yourself. Do you know what to do with a chattel mortgage when it becomes due and how long it takes a chattel mortgage to become due and what you should do for the renewing of it' . . ." (T.R. 232). Yet, on cross examination, when Mr. Stroeker was asked in substance, wasn't it a fact that the average layman would be declared incompetent because, "isn't it a fact that the average layman don't know anything" about the recording of chattel mortgages, and Mr. Stroeker answered, "Oh, no, he was too bright a man himself. He had known what he was doing. Mr. Colbert was no fool. When he was in his right mind he was a man of good intelligence. He wouldn't have been able to put over deals such deals as he had on the quartz claims and so on that he had unless he was a man of some intelligence. He had to know some-

thing about his business and he come from a good intelligent family.” (T.R. 234-235.) And yet, that same Bank President, that same witness who had been berating the decedent because of his purported lack of, shall we say sanity, in response to the direct question, “What is the present law. Mr. Stroeker, in regard to renewing chattel mortgages . . .” He answered, “Well, you have one year after the cancellation—one year after the due date of the chattel to renew, to take that over.” (T.R. 235) If Mr. Colbert could have been the kettle at the time he was having the so-called berated conference with Mr. Stroeker in the back of his bank and before he went to the hospital, how black must the pot, Mr. Stroeker, be when he testifies what “the present law” in regard to renewing chattel mortgages is, since a renewal of a chattel mortgage was later introduced, which heretofore belonged to Louis D. Colbert, the testator, in the year 1945, and marked Exhibit “M”, which is found at T.R. 305, which precisely, and directly, conforms to the law for the renewal of chattel mortgages by the so-called incompetent testator, Lou Colbert. Then Mr. Stroeker, sensing that possibly he may be on thin ice, totally evades the question as to whether or not he knew Mr. Colbert had ever renewed any of his chattel mortgages by stating, “Well, that doesn’t come under my—that’s his personal affairs. That isn’t my affair.” (T.R. 236) Mr. Stroeker further evades a direct answer to the question of whether or not he and Mr. Colbert had ever quarrelled, when he answers, “Oh, no. I never quarrelled with Lou at all. I never

had any occasion to quarrel with him. I very seldom quarrel with anyone at all. That isn't part of my business to quarrel with people. I think one must use a little diplomacy when they're in business." (T.R. 236) It was interesting to note that, in answer to a question as to whether or not Mr. Colbert ever asked Mr. Stroeker for the Will he had left at the bank, that Mr. Stroeker testified, "No, he didn't take that up with me. Had he done so, I would have referred him to the trust officer. That doesn't come under my department at all. That is what my trust officer is paid for, to look after those things, and I don't interfere with his business, unless he comes to me or unless I think he is doing something that is not quite right, otherwise, he uses his judgment. That's what he is paid for, for the knowledge he has in handling trust accounts and so on." (T.R. 237), which leads us up to the testimony of Mr. Frank DeWree, the trust officer of the First National Bank.

On direct examination, Mr. DeWree testified as to how long he had known Mr. Colbert, Mrs. Thelma G. Hayes, also referred to the account of Mr. Colbert during the year 1946, that he had a small bank balance of \$411.97, as of the 15th day of October. (T.R. 218) Then, surprisingly, counsel for the Appellee asked the witness whether or not he filed the petition "Asking that the bank be appointed Guardian", on the 23rd day of October, 1946, to which Mr. DeWree testified that he did, at which time he was asked, "Did you ever visit Lou over there yourself?" "No, I did not." "You did not see him yourself?" "No,



sir." ". . . And you were appointed—the bank was appointed guardian of his person and property?" "Yes, sir." (T.R. 220) Yet, this same witness, on cross examination, the evidence reveals, in response to a question, "Would you want somebody to act towards you, if you were in the same condition, as you acted towards Mr. DeWree—towards Mr. Colbert?", answered "I believe I left somebody else to look after—I think my other parties in my family would, but he didn't have any other members of his family." (T.R. 222) Further, this same trust officer, of the First National Bank, testified, Question: "Did you pay for his board any place?" "No, sir." Question: "Or see that he was well taken care of?" Answer: "No, sir." Question: "Did you go to see him when somebody else was taking care of him?" Answer: "We heard that somebody else was, yes." Question: "While you were—did you go and see him while somebody else was taking care of him?" Answer: "I didn't visit." Question: "Did you know that Thelma Gregor was taking care of Mr. Colbert?" Answer: "That is what we heard." Question: "Feeding him and giving him a place to sleep?" Answer: "He had his own home." Question: "What?" Answer: "He had his own place." Question: "Well, he had his own place? He was incompetent! Would you allow an incompetent—him as an incompetent to go and live alone at his home up on Gillam Way? You, being his guardian, would you allow him to go up and live alone?" Answer: "Isn't it all subsequent to this?" Question: "That was all after you were appointed

guardian. In other words you were his guardian of his estate and person, but it devolved upon somebody else to take care of Mr. Colbert didn't it?" Answer: "We didn't take any part in the administration. She just held right on, wouldn't let go of him, wouldn't deliver the keys to the house or nothing; wouldn't surrender anything." Question: "Well, how many times did you see Mr. Colbert after you were—the bank was appointed guardian of his estate?" Answer: "I forget." Question: "As trust officer of the bank, you looked after those particular affairs, do you not?" Answer: "Gee, I don't remember now." Question: "Did you go over to Thelma Gregor's to see Lou at any time?" Answer: "No." Question: "And after he went back to the hospital the second time, did you go over there?" Answer: "The second time? When was that?" Question: "He got out of the hospital and went back. The time he died. Did you go to see him then?" Answer: "No, I didn't see him." Question: "Were you collecting the rentals from Lou's houses at that time?" Answer: "No, we weren't." Question: "You received no money?" Answer: "I understood that she had made a lease with someone." Question: "While you were—the bank was acting guardian of the estate and person of Lou Colbert, did you collect any monies for his account, for his account?" Answer: "I would have to look at our record now. I couldn't say how much." Witness: "... I don't believe we collected anything during the guardianship, very small amount." Question: "Well, now what services did you, did the bank render then



as guardian of the estate of Lou Colbert? What did you do? You didn't look after his personal welfare. You didn't look after any of the property." Answer: "She had it all tied up." Question: "What?" Answer: "She had it all tied up already." Question: "But the important point is that you were the guardian. It was your duty to untangle it or untie it if necessary." Answer: "Well, I think the account of the report of the guardianship would show that . . ."

(T.R. 222, 223, 224, 225) Mr. DeWree, when pressed further on cross examination as to, Question: "Are you positive that you did not collect any rents on the account of the guardianship of Lou Colbert?", answered: "I am not positive. I have to refer to the records when we started collecting rents." Yet, on re-direct examination the witness was very glib to state, in answer to the question of whether or not there was any money in the bank of the guardian, "No, we had to put up some fees ourselves." Then when the trust officer was asked: "And the first money that come into the estate was that money which was paid after the building was sold and the mortgage foreclosed against Thelma Gregor, is that right?" Answer: "We received money from that and we received some rents from some cabins on Gillam Way. I forget just when that was. I think it was during the administration of the estate though." Question: "The principal property of the estate was money that was recovered on the judgments that he got on his mortgages against the property of Thelma Gregor, isn't that right?" Answer: "Yes, that's right." (T.R. 227.) And again,

in answer to a question, "As his guardian, you didn't check to see if he had money elsewhere, then?", "No, we never did." (T.R. 228.) DeWree certainly was truthful in his statements as to what the First National Bank, either as President or Mr. Frank DeWree, as trust officer, *did not do under the appointment of guardian of the estate*, for a cursory perusal of probate file 1114, which is marked Petitioner's Exhibit "A", (T.R. 91) and also (T.R. 87), which is the guardianship file, shows that the trust officer, Frank DeWree, and the present witness, nor any other officer of said bank did nothing, under the guardianship, after the judgment was signed on the 19th day of November, 1946, and an undertaking was filed on the 17th day of January, 1947, by Andrew Nerland and Davis Runyon, until an inventory was filed *on the 9th day of November, 1949*, or over two years after the testator had died and the First National Bank had been appointed guardian of the estate and property of the testator, Lou Colbert.

Referring to the testimony of Mr. Julian A. Hurley, who testified at T.R. 244, that he had done a lot of legal work for Mr. Colbert "at different times . . .", a passing salute should be given to the fact that only sixteen days prior to the time that Dr. Schaible testified that Mr. Colbert entered the hospital, October 9, 1946, (T.R. 191), Mr. Hurley prepared a contract at the request of Mr. Colbert (T.R. 274), notarized the same after Lou Colbert had signed it in the presence of other witnesses, in Mr. Hurley's office (T.R. 248), and when presented with the Agreement (T.R. 246),

which is marked Exhibit "N", (T.R. 307, etc.), in answer to the question, "Was Mr. Colbert competent on the day he signed that?", he answered, "Well, *I did not think he was incompetent at that time.*" Yet, this same witness testified, at T.R. 241, "Oh, yes. I would like to make a statement that—one more statement, pardon me. In my experience as United States Attorney in Anchorage for 2½ years and United States Attorney here for 9 years, I have had considerable experience conducting examinations before the Court in connection with persons charged with being insane and not of sound mind. From my conversation with Lou Colbert and my observation of him over there and his actions, I would say that in my opinion he wasn't of sound mind. I thought that he was just as crazy as any man I ever saw committed to the asylum."

It is revealing to note, after a thorough investigation of the Exhibits introduced either by the Appellant or the Appellee, that they sustain a continuity of competency on the part of the testator, Louis D. Colbert, from January of 1946 to May the 25th of 1947, a few of which are noted as follows, which heretofore have not been referred to in the discussion of the evidence:

Appellant's Exhibit "J", being a real mortgage from Thelma G. Hayes to L. D. Colbert, dated the 22nd day of January, 1946. (T.R. 298).

Receipt from L. D. Colbert, Appellant's Exhibit "K", which recites as follows:

“Receipt

July 6, 1946

Received from Thelma Hayes Twelve Hundred Twenty Four Dollars for payment in full with interest on Graehl Circle Bar Mortgage. \$1224.00 paid in full.

/s/ L. D. Colbert.” (T.R. 302)

Checks written by Colbert:

August 1. Pay to the order of L. D. Colbert, \$26.96 (T.R. 290)

September 7. Pay to the order of Arctic Piggly Wiggly Co. (T.R. 291)

September 24. Pay to the order of N. C. Co. \$14.39 (T.R. 292)

September 26. Pay to the order of Corner Drug Store \$1.25 (T.R. 287)

September 28. Cash \$10.00 (T.R. 287)

October 2. Pay to the order of Cash \$20.00 (T.R. 288)

October 4. Pay to the order of W. R. Tucker \$12.00 (T.R. 291)

October 10. Pay to the order of Healey River Coal Co. \$14.16 (T.R. 290)

all of the above checks being signed by L. D. Colbert.

On October 7, 1946, Louis D. Colbert executed a Power of Attorney to Thelma Hayes, Appellant's Exhibit “E” (T.R. 282-283).

October 23, L. D. Colbert wrote a letter to Fairbanks Agency Company, Appellant's Exhibit “G” (T.R. 286) as follows:



“Fairbanks, Alaska  
October 23, 1946

Fairbanks Agency Co.

Fairbanks, Alaska

Dear Sirs:

This will authorize you to allow Thelma Hayes to have access to my safe deposit box in your place of business.

Very truly yours  
/s/ L. D. Colbert.

Witnessed by:

/s/ Kenneth D. Wire,  
/s/ Arthur A. Benz.”

October 24, L. D. Colbert addressed an envelope to Collins & Clasby, Fairbanks, Alaska. (T.R. 271)

“Collins & Clasby  
Fairbanks, Alaska”

and enclosed a note to Thelma, dated the 24th day of October, 1946. (T.R. 272).

“L. D. Colbert  
Box 1356

Fairbanks Alaska

Clinic

Oct. 24, '46

Thelma

They will try me on Nov. 6, tell Mr. Clasby, and get him to take my case.

I can't phone from here. Let me hear from you.

Yours,  
LOU.”

Then, after having made a second Will, said second Will being the first Will dated the 22nd of October,



1946, but not the Will under contest, which provided among other things, “. . . provided, however, the said Thelma G. Hayes shall pay to my sister, Emma Colbert, of Indianapolis, Indiana, the sum of Twenty-five Dollars per month so long as my sister shall live, the same to be paid out of the income or principal of my estate.”, and after having interlineated the foregoing with an additional provision, after he had thought it over, see Appellant’s Exhibit “D” (T.R. 280, 281, 282), the testator then had the first Will rewritten on the 22nd day of October, 1946, after he had called his Attorney over to prepare the same (T.R. 106-107) which provides for a lump sum payment to his sister, Emma Colbert, in the sum of One Thousand Dollars, and which was signed in the presence of three witnesses. See Appellant’s Exhibit “C”, (T.R. 278, 279, 280).

Appellant’s Exhibit “L” (T.R. 303) a letter dated the 21st day of February, 1947 from the testator’s sister, Emma Colbert, which has heretofore been briefly referred to.

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#### **SPECIFICATION OF ERRORS.**

Based upon all of the evidence set forth in the transcript of the record, which included all of the exhibits of both the Appellant and of the Appellee, it is the opinion of the Appellant that the Probate Court, together with the United States District Court for the Fourth Division of the Territory of Alaska, which affirmed the findings of the Probate Court, in

Cause 6515, erred when they found that the testator, Louis D. Colbert, was not of sound and disposing mind and memory and was mentally incompetent to execute a Will on the 22nd day of October, 1946, and that the petition of the said Thelma G. Hayes should be dismissed, the reasons and the citations of law for which will appear in the argument of this brief, hereinafter set forth.

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### ARGUMENT.

THE UNITED STATES DISTRICT COURT FOR THE FOURTH DIVISION OF THE TERRITORY OF ALASKA ERRED WHEN IT FOUND AND HELD THAT THE TESTATOR, LOUIS D. COLBERT, AT THE TIME HE SIGNED HIS THIRD WILL, WHICH WAS REFERRED TO IN THIS CASE AS THE SECOND WILL DATED THE 22ND DAY OF OCTOBER, 1946, AND WHICH WAS WITNESSED BY THREE WITNESSES, WAS NOT OF SUFFICIENT MIND AND MEMORY TO REMEMBER THE NATURAL OBJECTS OF HIS BOUNTY, TO HAVE IN HIS MIND HIS SEPARATE ITEMS OF PROPERTY, AND TO MAKE A DISPOSITION OF IT ACCORDING TO SOME PLAN FORMED IN HIS MIND WHICH IS NOT AFFECTED BY SOME OPERATING INSANE DELUSION, FOR THE REASON THAT IT IS CONTRARY TO THE LAW BASED UPON THE EVIDENCE HERETOFORE SET FORTH IN THIS BRIEF.

A thorough and searching study of all of the evidence does not disclose, remotely or otherwise, that there was one witness, nor was there any documentary evidence presented by either the appellant or the appellee that disclosed, or even winked at the finding of the court that on the 22nd day of October, 1946, the testator, Louis D. Colbert, was incompetent or of unsound mind and memory that would preclude him from remembering or knowing the natural objects,

or having in his mind the separate items of his property, or making disposition of his property according to some plan formed in his mind which is not affected by some operating insane delusion (see test set forth and cases citing law on page 10 of this Brief).

The court could not find that on the 22nd day of October, 1946, or on any hour of that day, from the evidence presented by the appellees at the trial in the District Court that the testator, Louis D. Colbert, was insane, incompetent, or that any person used undue influence, coerced him or in any manner whatsoever exercised any power upon him to influence his ultimate act of signing and executing his will, since it stands un rebutted that it was he, the testator, Louis D. Colbert, who requested that the first will be prepared on the 22nd day of October, 1946; it was the testator who requested that the first will prepared on the 22nd day of October, 1946, be changed by interlineation; and it was the same said testator, Louis D. Colbert, who requested that Warren A. Taylor, an attorney admitted to the practice of law, prepare a second and subsequent will on the 22nd day of October, 1946, to conform to his reconsidered disposition of his property according to a plan formed in his mind and which carried out, as the evidence undeniably and overwhelmingly discloses, his desire to provide for the natural objects of his bounty. (T.R. 102-110).

The appellants unrefutedly proved this point, as was testified to by Warren A. Taylor, the attorney who prepared both wills, V. A. Cobbell, Arthur A. Benz and James F. Haynes, attesting witnesses, and



further corroborated by Thelma G. Hayes, who, the evidence discloses, knew nothing about the signing of the first will, which named her as beneficiary, signed on the 22nd day of October, 1946, and likewise named her as beneficiary of his second will of that date, and the one which is in contest, after he had made arrangements for a sister whom he felt should have some money. Where, oh where, within the detailed transcript and/or the Exhibits, is there one scintilla of evidence upon which the court could find that the testator, Louis D. Colbert, was unsound in his mind and memory and incompetent so as not to know the "natural objects of his bounty" on the 22nd day of October, 1946, and this the court positively had to find?

In a recent California case with facts very similar to the case at hand, that State's highest court found there was no substantial evidence to sustain the finding that the decedent was not of sound and disposing mind and memory at the time he executed the will in question. *In re Llewellyn's Estate*, 189 P.2d 822 (1948). The court states at page 833:

"Except for the hospital records, all of the testimony produced in behalf of the contestants and respondents, as hereinbefore narrated, concerned the condition of the testator before and after the actual date and time when the will was executed, and the same was admissible only in so far as it tended to show the testator's condition at the very time the will was made. As was stated by this court in *Estate of Russell*, 80 Cal.App.2d 711, 721, 182 P.2d 318, 324: 'Before a solemnly exe-

cuted will may be set aside, the claimed infirmities of mind or body must be shown to have had a direct bearing upon the testamentary act, and the evidence must establish the fact that the deceased devised or bequeathed her property in a manner which, except for the claimed infirmities, she would not have done.' ”

“Respondents urge that no determination of the testator’s mental capacity can be predicated upon what he said or did, or failed to do, on March 9 or March 12, 1945, or on any given day, or at any given hour. That he did not suffer at some particular moment a mental collapse, but rather experienced a long period of mental limitation followed by a period of some months (just prior to his entry into the hospital in early March of 1945) during which mental and physical deterioration was very definite and rapid, and that finally his condition culminated in a state of such irresponsibility that on March 9 and March 12 he did not have testamentary capacity. But this contention is in contravention of long and well established principles of law which hold that testamentary incapacity must be shown by a preponderance of the evidence to exist at the time of the execution of the will, and that any infirmities of body or mind had a direct influence upon the testamentary act . . .” At page 834.

In the case of *In re Rich’s Estate*, 169 P.2d 373 (1947), the court at page 378 states as follows:

“It is fundamental that testamentary capacity exists when the testator understands the nature and situation of his property, recalls and understands his relation to the persons who have



claims upon his bounty and whose interests are affected by the provisions of the will. Estate of Garvey, 38 Cal.App.2d 449, 457, 101 P.2d 551. We fail to find in the record herein any substantial evidence that decedent did not possess such understanding. It must be conceded that the testatrix was unquestionably in great distress and mental agony at the time she wrote her holographic will and that it was written in contemplation of self-destruction. The fact that the testatrix was a suicide was properly received in evidence as tending to establish insanity but there must be more than the mere fact of suicide to show that the insanity was so complete as to destroy testamentary capacity . . .”

See *In re Morley's Estate*, 5 P.2d 92.

Oh, yes, the appellees did their utmost, and supplied all of the evidence available to them in support of their position, in that Dr. Schaible testified: “He was a man aged and his general health was deteriorating. I had known him previously in 1945 and he was always neat in his habits and when I saw him on the 8th of October, he was very slovenly in his appearance. His bodily processes, his general everything had slowed up. I recall very distinctly that it seemed to take him forever to dress and undress. He was very unsteady. He was very unclean. His underwear was dirty. He wasn't the same. He didn't act the same as he had before. His general health—I saw all the stigma of a generalized arteriosclerosis. That's a hardening of the arteries and it's a disease that comes on with aged people and it affects different people dif-

ferently. \* \* \* I recommended—on the 8th I told him to come back the next day as I recall it, and he did come back. He wasn't doing too well and his odor was offensive to the people in the waiting room, so *I recommended that he go to the hospital.*" (T.R. 190, 191)

This same witness later testified that he did not see him on the 21st, the 22nd, the 24th or the 25th day of October, 1946 (T.R. 204), but in answer to a question propounded by Mr. Hurley on Redirect examination (T.R. 203): "Was Mr. Colbert at that time on the 17th of October and on the 22nd of October, was he of sound and disposing mind?" Answer: "No." Yet this same witness on cross examination admitted that he did not know what the law considered to be the test of mental capacity as would entitle him, in the eyes of the law, to make and publish his last will and testament, and he compared the soundness and disposing memory of a testator's mind to that of an individual who could manage his affairs, by replying to a question phrased in the above language, "Yes, I should think so." (T.R. 197)

It is the opinion of the appellant that the general rule of law which defines testamentary capacity is set out in *Wills 40 Cyc.* 1004, 1006:

"Testator must have sufficient mind and memory intelligently to understand the nature of the business in which he is engaged, to comprehend generally the nature and extent of the property which constitutes his estate, and which he intends to dispose of, and to recollect the objects of his

bounty. The testator need not have the same perfect and complete understanding and appreciation of any of these matters, in all their bearings, as a person in sound and vigorous health of mind and body would have; nor is he required to know the precise legal effect of every provision in his will. Absent-mindedness or mere intellectual feebleness does not disqualify a person to make a will, as the feeble have as much right to dispose of their property as the strong."

Upon the question of testamentary capacity, it was stated in *Re Estate of Arnold*, 16 Cal.2d 573, 585, 107 P.2d 25, 32:

"Ability to transact important business or even ordinary business is not the legal standard of testamentary capacity, though it seems to be quite generally, but mistakenly, supposed outside the ranks of the legal profession, that a capacity to transact important business is the criterion of fitness to make a valid will."

In this respect it is interesting to note the case of *In re Simmons Estate*, 151 P.2d 8 (1944). The testator in that case was a man of 81 years of age, and according to some witnesses, drank excessively. He was an illiterate and could only make his mark rather than sign his name. He, too, suffered from arteriosclerosis. Yet his physician, when called in to testify in the contest of his will, stated that "for a man of his years, testator was in as good physical condition as a man of his age could possibly be; that testator had arteriosclerosis but that such condition did not ne-

cessarily indicate a weakening of the mind.” The court in upholding the will quoted at length from *Re Estate of Johanson*, 144 P.2d 72, 76, as follows:

“The test, which is not a difficult one to meet, is that one has testamentary capacity if he is able to understand and carry in mind the nature and situation of his property and his relations to the relatives and those around him, with clear remembrance as to those in whom, and those things in which he has been mostly interested, capable of understanding the act he is doing and the relation in which he stands to the objects of his bounty . . . A more rigid test would invalidate many wills, for it is of common knowledge that the making of wills is often deferred until testator is in contemplation of impending death through old age or sickness. As a consequence, many wills are made, and validly made, by those who no longer have ability to conduct their business affairs because of loss of mental vigor or partial loss of memory. Extreme care should be exercised in applying the settled rules to the facts of a given case, as a decision at variance with those rules would set an unfortunate precedent.”

The witness, Dr. Schaible, testified in answer to the following question: “Doctor Schaible, when a man with this senile type of structure to which you referred Mr. Colbert had at this time, have periods when he would be clear and of disposing memory?” Answer: “I think so.” Question: “Is it possible?” Answer: “It is possible.” (T.R. 205)

And further, this same Dr. Schaible, when a hypothetical question was placed to him as follows: “Doc-



tor Schaible, I would like to present a hypothetical question to you. If on or about the 17th day of October, 1946——” Mr. Hurley: “What date was that?” Mr. McCarrey: “17th day of October, 1946.” (Mr. McCarrey—Continuing): “A person executed a will, executed a power of attorney to an individual; assuming further that on or about the 22nd day of October, 1946, that the same individual called his attorney and asked him to draw a will which his attorney did prepare and then, according to his direction, and then assuming a step further, that this same individual did call his attorney again and have him come back and make a correction to the original will; would a person of that mental status be competent to dispose of his property and to execute any will?” \* \* \* Witness: “Yes.” (Question by McCarrey): “What is that answer?” Answer: “This was a hypothetical question and I said ‘Yes’.” Mr. Hurley: “What do you mean by that?” Witness: “I meant a person who he said a person who desired to make a will on the 15th and called an attorney to make the will according to his instructions and then later signed it and later called him back presumably—someone who did all that I would say he is of presumably of sound and disposing mind, if he did it according to his directions.” (T.R. 202, 203)

Thus the only witness or scintilla of evidence that the appellees were able to produce or adduce at the trial was the testimony of a doctor who saw the testator last on the 20th day of October, 1946, or two days prior to the time that the will in question was



made, and we do not know what time after that the same doctor may have seen the testator, but we know that he did not see him on the 25th day of October, 1946, according to his own statement (T.R. 204), and yet this same doctor, in answer to the hypothetical question, and the question of whether or not an individual suffering from arteriosclerosis would have periods of a "clear and of disposing memory", he stated: "I think so." (T.R. 205)

Thus the court erred in finding that the testator was not of sound mind and disposing memory on the 22nd day of October, 1946, based on the testimony of the one and only witness who could talk with any degree of assurance that he had personally visited the testator near the time the testator published and declared his last will and testament, and that was two days prior to the date that said will was made and published by the testator. Obviously the court in its wisdom and discretion has the right and the power to find as it sees fit, but the court is without power and authority to go beyond the scope of the evidence and of the law, and find against the evidence and the law, for some reason not set forth in the evidence or the law. It appears to the appellant that the court in this case erred as a jury did in the case of *In re Llewellyn's Estate*, supra, where the appellate court states, at page 842:

"From a review of the entire record, we are forced to the conclusion that there is not sufficient evidence to support the verdicts and the judgment predicated thereon. As was said in the case of *In re Wilson*, 117 Cal. 262, 279, 49 P.2d 172, 177,

. \* \* \* The case presents another instance of a jury being, insensibly perhaps, carried away from the real issues legitimately before them by a notion that the will was not such as in their opinion it ought to have been, and therefore ought to be set aside.' ”

The facts of that case are so similar to the facts of the present case, that they should be set out. The testator was 78 years old at the time of his death. In 1944 his health began to fail and he was under the care of a nurse at his home until hospital space became available to him on or about the 3rd day of March, 1945. The testator suffered from hardening of the liver, gall stones and ulcers, not to mention minor related conditions. During the stay in the hospital he executed two wills, one on the 9th day of March and the other on the 12th day of March, 1945. They were identical as to disposition of his property, but he was not satisfied with the signature on the first will, so he ordered the second one prepared, leaving everything to his brother. He died in September, 1945, while in the hospital. A previous will was discovered, leaving the bulk of his estate to a niece and nephew, who contested the will of March 12, 1945. The contestants introduced evidence to the effect that the testator was senile, childish, greatly deteriorated in mind and body, and suffered from the delusion that he was on a ship crossing the ocean, or at times he imagined the bed clothes were on fire. Yet they failed to establish the fact that at the time testator executed and published his last will and testament he was not

of sound mind and disposing memory, and the court held that the evidence was not sufficient to warrant a finding that the testator was incompetent to make his will.

It is striking to note that the appellees in their Answer (T.R. 15, 16, 17) refer constantly to "a pretended will, claimed to be executed by said deceased, on the 22nd day of October, 1946. . . . Admits that said petitioner is a person named in said pretended will, claimed to have been executed on the 22nd day of October, 1946, as Executor of said pretended will of said deceased." Again in the first affirmative defense and answer and again in the second affirmative answer and defense, they state: "\* \* \* purported will . . . was not the free and voluntary act and deed of the said Louis D. Colbert, and the said will was not signed by the claimed attesting witnesses at the request of the said Louis D. Colbert, or in his presence, or in the presence of each other." Yet the same appellees did not introduce one scintilla of evidence to prove undue influence, or that the will in contest was not a will, or that the will was not signed by the testator, Louis D. Colbert, that the witnesses did not sign at the request of the testator, that the witnesses did not sign in the presence of the testator and each other. Oh, yes, on cross examination every effort was made to try to prove that the testator did not request the witnesses to sign the will, that the witnesses did not sign in the presence of the testator, or in the presence of each other, but as indefatigably as the appellees tried, they did not prove that the witnesses did



not sign at the request of the testator, or that the witnesses did not sign in the presence of the testator and one another, or that the signing was not the free and voluntary act of the testator. Why did not the appellees produce some of the nurses, or the nurse who was present during the signing of the will, as testified to by Thelma Hayes (T.R. 169) and Arthur Benz (T.R. 100)? Naturally one would assume their reply would be that the nurses were gone and were no longer there. Then, if that were the case, why did they not produce some of the Sisters from the hospital. Surely both the nurses and the Sisters would not leave in that short a period of time. Why did not the appellees produce witnesses, including, but not by way of limitation, the doctor who visited the testator on the 22nd day of October, 1946, or on the 21st day of October, or on the 23rd day of October, 1946? Isn't it a fact logical to suppose that the reason why the appellees did not produce these witnesses was because they could not find any witnesses who could testify that Louis D. Colbert was incompetent on the 22nd day of October, 1946? And yet the appellees have the burden of proof to show that the will was not the free and voluntary act of the testator, that it was a pretended will, that it was not his signature, that the testator did not request the witnesses to sign the will, that the witnesses did not sign in the presence of the testator or of one another, as is shown by the following cases:

*In re Llewellyn's Estate*, supra, at page 835: "The presumption is that a person was of 'sound mind' at the time of the execution of his will, and the burden therefore always rests upon the contestants to show affirmatively and by a preponderance of the evidence the incapacity of the testator and the further fact that except for alleged infirmities of mind or body he bequeathed his property in a manner that he otherwise would not have done.

"Giving consideration to all of the foregoing evidence introduced by contestants and respondents, we must hold that it falls far short of constituting what the law regards as a rebuttal of the presumption of testamentary capacity at the time of the execution of the will, and existence of which is destroyed only when by substantial evidence it is shown that a testator was unable to understand and carry in his mind the nature and situation of his property, his relations to his relatives and those around him, incapable of understanding the act he is performing, and the relation in which he stands to the objects of his bounty if any."

*In re Estate of Hull*, 63 Cal.App.2d ....., 146 P.2d 242, 246: "The burden was on the contestants to show undue influence and in meeting that obligation it is not sufficient for them merely to show circumstances consistent with the exercise of undue influence but before a duly and solemnly executed will can be invalidated, circumstances must be shown that are inconsistent with freedom of action on the part of the testator."



Now, there is no question but what the general law is that if the testator was insane, incompetent, or suffered from delusions at the time he executed his last will and testament, in this case on the 22nd day of October, 1946, that such insanity or incompetency or delusions must have been such as would affect the disposition of the testator's estate in order to invalidate a will.

*In re Teel's Estate*, 145 P.2d 330: "Incompetency or unsoundness of mind sufficient to void a testamentary act, must be either insanity of such broad character as to establish mental incompetence generally or some specific and narrower form of insanity under which testator is victim of some hallucination or delusion, and as to the latter, the evidence must establish that the will was the creature or product of such hallucination or delusion and that it influenced the creation and terms of the will."

*In re Johanson's Estate*, 144 P.2d 72: "Testamentary capacity is not destroyed by mere false beliefs or departure from normal thoughts or action, nor even by insane delusions that do not bear directly upon and influence the terms of the will."

*In re Llewellyn's Estate*, supra, at page 832: "In re Estate of Finkler, 3 Cal.2d 584, 594, 46 P.2d 149, 153, the court approved this statement taken from *Starkhouse v. Horton*, 15 N.J.Eq. 202: 'No judicial tribunal would be justified in deciding against the capacity of a testator upon the mere opinion of witnesses, however numerous or respectable. A man may be of unsound mind, and his whole neighborhood may declare him so; but

whether that unsoundness amounts to incapacity for a discharge of the important duty of making a final disposal of his property is a question which the court must determine upon its own responsibility.' \* \* \* The case may be summed up in the language of *In re Estate of Wright*, 7 Cal.2d 348, 356, 60 P.2d 434, 438, reading: 'Tested by the decisions of this court, the judgment is wholly without evidentiary support. There is no evidence that testator suffered from settled insanity, hallucinations or delusions. Testamentary capacity cannot be destroyed by showing a few isolated acts, foibles, idiosyncrasies, moral or mental irregularities or departures from the normal unless they bear directly upon and have influenced the testamentary act. \* \* \* The burden was upon contestant throughout the case. Taking all the evidence adduced by contestant as true, it falls far below the requirements of the law as constituting satisfactory rebuttal of the inference of testamentary capacity.' "

As the case stands on appeal, the testator, Louis D. Colbert, met Thelma G. Hayes, the prime beneficiary under his last will and testament, which is presently under contest, some time during the year 1937, and that he had been "just like a father to her." He had loaned her money, counselled her in business, been a very close friend to her mother, Cecilia H. Gregor, and to her father. As a matter of fact, the testator had attended the funeral of her father after he got out of the hospital, after he published and executed his last will, and it stands undenied that immediately upon leaving the hospital he went to see her mother,

Mrs. Cecilia H. Gregor, and then from there went to Thelma Hayes' place, where he resided until the time of his death, which was on or about the 25th day of May, 1947. Also it stands un rebutted that prior to the testator ever entering the hospital in October of 1946, the prime beneficiary had cared for him, in that she had cleaned the house, washed his dishes, helped him with his business, and was one of the individuals who recommended that he go to the hospital for his own good. Further, this same prime beneficiary was the one person who saw that he had a room by himself that had running water and toilet facilities in it, that he had good meals, that a barber came to take care of him occasionally, and that a doctor was called in to see him, all of which costs she bore herself. While on the other hand, we have the First National Bank of Fairbanks, Alaska, the appointed guardian and the executor appointed in a will made on the 14th day of November, 1938, or some eight years prior to this date, who never did a thing for his comfort, well-being or apparent interest, either of his property or his person, until after he died and was buried. And yet it was the First National Bank who was quick to cast a shadow of doubt upon a man of good reputation and well standing in the Territory of Alaska by signing a petition to declare him incompetent. It was the First National Bank which, on the 27th day of May, 1947, filed a petition to probate the estate under a last will and testament made on the 14th day of November, 1938, as aforesaid, either prior to the date of his burial or concurrently therewith. What interest did the



First National Bank of Fairbanks, Alaska, have, either as guardian or as executor, or the president, Edward H. Stroeker, or the trust officer, Frank DeWree, have in Louis D. Colbert, or his estate? (See references to Transcript in discussing Evidence.)

It cannot be said that the testator and the First National Bank were on the best of terms, even prior to his entry into the hospital. Mr. Stroeker president of the First National Bank, in answer to a question whether or not he and Mr. Colbert quarrelled, answered (T.R. 236): "I never quarrelled with Lou at all." Since the testator cannot speak for himself, we then must refer to evidence from some other source, and it is interesting to note that Mr. Stroeker testified (T.R. 231) about a conversation he had with Lou, in which Lou did not know about real or chattel mortgages or insurance, and in general gave him a lecture. Doesn't it seem possible that there must have been some misunderstanding between Mr. Stroeker and Mr. Colbert at that time, or before? Otherwise Mr. Stroeker would have no occasion to talk to Mr. Colbert, for had he been sincerely interested in Mr. Colbert, as he would now lead you to believe, by virtue of his conversation, he would have at least gone over to see Mr. Colbert while he was in the hospital, or would have seen that the trust officer would have taken time out to provide the humble needs at the hospital of the testator. It was also Mr. Stroeker who advised Mrs. Hayes that he would not cash a check, as they were starting a suit to stop that, even though she had a Power of Attorney, dated the 17th day of October,

1946, and prior to the time that the guardianship suit had even been filed. (T.R. 154). This fact was never rebutted and therefore stands uncontradicted on appeal. Mr. Stroeker likewise had the audacity to call up another place, namely, the Fairbanks Agency Company, and advised them not to let Mrs. Hayes in the (safety deposit) box. (T.R. 156, 157). Evidence of animosity between the testator and the Bank is further brought out by the testimony of Thelma Hayes (T.R. 171): "Well, he was just furious about serving incompetent papers on him while he was sick in the hospital."

Isn't it also of importance that Mr. Colbert made loans from time to time directly in competition with the Bank, since the same Mr. Stroeker, on cross examination, testified: "He would not have been able to put over such deals as he had on the quartz claims and so on unless he was a man of some intelligence", and that is corroborated by Thelma Hayes' testimony, when she stated: "Well, he used to loan lots of money to different people." (T.R. 145)

Certainly there is no doubt but what the First National Bank quarreled bitterly and gravely with Mrs. Hayes, in light of the evidence (T.R. 180, 181, 182), and for what reason, since Mr. DeWree testified himself that there was only the sum of \$388.56 as of the 27th day of June, 1946, and the statement of appellees, Exhibit No. 1 (T.R. 313) discloses that the balance was only \$411.97 as of the 15th day of October, 1946, being the date prior to the time that the testator had given his Power of Attorney to Mrs. Hayes to draw



checks on the Bank. Does it seem logical that the penurious Bank was interested in Louis D. Colbert, testator, or Thelma Hayes, or could it have been some other reason?

No doubt counsel for appellees will argue that there is some conflict as to whether or not the two wills were actually signed by the testator on the 22nd day of October, 1946 (Taylor, T.R. 106, 107, 108). That argument will carry a blank load for the reason that it was testified to by all of the witnesses, including Mr. Taylor, and corroborated by Thelma Hayes, that the testator did sign the wills, and the burden of proof is upon the appellees to show that the wills were not so signed, which they have failed to do, inasmuch as the appellant's evidence stands unrebutted and undenied.

Looking at the heirs of said testator, the only evidence we have on that point is that he at one time had one sister and one brother, and as of the 17th day of February, 1947, we are certain that he had one sister, since she wrote him a kind letter thanking Thelma Hayes in the following words: "I am grateful to Mrs. Hayes for looking after you and want her to know how much I appreciate her efforts. I am pleased to know that she helps you to remember me." Who are the natural objects of his bounty? Whom would the average testator have in his mind to be the recipient, beneficiary and devisee of his acquired worldly goods at a time such as this and under the same circumstances?

The change in the second will which the testator executed on the 22nd day of October, 1946, that provided his sister, Emma Colbert, with a lump sum payment of \$1,000.00, although she was well taken care of in her own right, as was also his brother (T.R. 150), was a natural change, since she likewise was advanced in years. Suppose Edward H. Stroecker, president of the First National Bank; Frank DeWree, trust officer of the First National Bank; James E. Barrack, a business man who was a hardware and machinery dealer; Frank Young, an old friend of Louis D. Colbert; Arthur Lutro, a miner from Ruby; Dr. Arthur John Schaible; Andrew Nerland, a businessman engaged in the paint and furniture business; Mike Stepovich, a friend of long standing of Louis D. Colbert; Harvey Van Hook, a mining man from Fairbanks; and last, but not least, Julian A. Hurley, attorney at law, who testified that on the 23rd day of September, 1946, "I did not think Louis D. Colbert was incompetent at that time," (T.R. 247) were unmarried and facing the eventuality that comes to us all, whether rich or poor, and had determined to execute their last will and testament, whom do you think they would name as the natural objects of their bounty? Might they not consider an older sister who was well taken care of first by a lump sum settlement and then an individual who had been friendly to them for at least eight long years, and who had helped them in their last hours of need? Apparently some courts hold that such a will is a natural one.

*In re Agnews Estate*, 151 P.2d 126, (1944).

True the appellant did not have any doctors or bankers testifying for her at the time of the trial. It is true that the appellant did not have all business people testifying for her and on her behalf. But a search of the law in the matter of the execution of wills fails to disclose any law from any State, or any inference that the wills of the meek and lowly have to be witnessed by doctors, attorneys or businessmen, for the general law is very specific that the ordinary formalities set up by each state need only be complied with, and that the witnesses need only be regular, normal individuals, regardless of their walks of life, as the witnesses were in this case, part of whom had never seen the other before, nor had they conversed with one another since the date and time of their presence when the will of Louis D. Colbert was signed by him and given to the attorney whom he had requested to prepare the will, where it stayed until after the demise of the testator.

Louis D. Colbert was a bright and keen man, as was undeniably proved at the trial, and because of his experience in the probate of another estate, which Mr. Hurley testified to as being the William Kelly Estate, in which Louis D. Colbert acted as administrator (T.R. 238), and in which Mr. Hurley acted as attorney, a few more details being borne out in Appellant's Exhibit F (T.R. 286), the testator not only made one will, but made two wills on the 22nd day of October, 1946, and instead of having the customary two witnesses, he specifically requested three witnesses, because he did not want the same thing to hap-

pen to him that happened to William Kelly. Appellant's Exhibit A-1 (T.R. 167). In light of the fact that the testator had three witnesses upon his will, it is the opinion of the appellant that he anticipated the very thing that happened in this case, since Thelma Hayes testified in detail about the three witnesses phase of his will at T.R. 167.

Certainly the testimony of the subscribing witnesses should be given more weight than those individuals who had seen the testator before or around, but not on the date, and the only date to be taken into consideration, the 22nd day of October, 1946, as far as this case is concerned. The witnesses attesting a will must not only witness the signing and publishing of the will by the testator but must also satisfy themselves that he is of sound and disposing mind and capable of executing a will, and hence the testimony of such subscribing witnesses is entitled to greater weight than the testimony of a witness who had no such duty to perform and particularly of witnesses who were not present at the time the will was executed and did not see testator the day of its execution. *Fortenberry v. Herrington*, 196 So. 232. *In re Miller's Estate*, 116 P.2d 526.

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### CONCLUSION.

Therefore the court erred when it found that Louis D. Colbert on the 22nd day of October, 1946, was not of sufficient mind and memory to remember the natural objects of his bounty, or to have in his mind his



separate items of property or to make a disposition of it according to some plan formed in his mind which is not affected by some operating insane delusion, inasmuch as there was no substantial evidence to support such a finding, nor was the finding in accordance with the law.

For the foregoing reasons we believe that the judgment should be reversed, and the petition for the probate of the will filed by Thelma G. Hayes in Probate Cause No. 1145 on the 9th day of June, 1947, should be allowed, and that the Letters Testamentary issued to the First National Bank of Fairbanks, Alaska, should be revoked.

Dated, Anchorage, Alaska,  
April 9, 1951.

Respectfully submitted,  
J. L. MCCARREY, JR.,  
WARREN A. TAYLOR,  
*Attorneys for Appellant.*



No. 12,771

IN THE

United States Court of Appeals  
For the Ninth Circuit

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THELMA D. HAYES,

*Appellant,*

vs.

FIRST NATIONAL BANK OF FAIRBANKS,  
Executor of the Estate of Louis D.  
Colbert, Deceased,

*Appellee.*

Appeal from the United States District Court for the  
Territory of Alaska, Fourth Division.

BRIEF OF APPELLEE.

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JULIEN A. HURLEY,

Fairbanks, Alaska,

*Attorney for Appellee.*

FILED

MAY 16 1951

PAUL A. O'BRIEN,  
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**STATEMENT.**

On the 7th day of October, 1946, Louis D. Colbert signed a power of attorney appointing Thelma D. Hayes, who owned and operated the Graehl Circle Bar in Fairbanks, Alaska, his attorney-in-fact. (T.R. 282-283.) On the 8th day of October, 1946, the said Louis D. Colbert visited the office of Dr. Schaible for a treatment and on the 9th day of October, 1946, he returned to the doctor's office and the doctor recommended that he go to the hospital. Arrangements were made by the doctor and Mr. Colbert became a



patient in the hospital on the 9th day of October, 1946. (T.R. 190-191.) That on the 16th day of October, 1946, the said Thelma D. Hayes, acting under the said power of attorney, made her first withdrawal in the sum of One Hundred Dollars (\$100.00) from the account of the said Louis D. Colbert in the First National Bank of Fairbanks, Alaska. (T.R. 310.) On the 17th day of October, 1946, Warren A. Taylor, as a notary public, took the acknowledgement of the said Louis D. Colbert to said power of attorney. (T.R. 114, 283-284.) On the 22nd day of October, 1946, in the early morning and shortly after midnight L. D. Colbert signed what was purported to be his Last Will and Testament. The names of V. A. Cobbell and Arthur A. Benz of Fairbanks, Alaska, appeared on the will as witnesses. (T.R. 280-281-282.) In the afternoon of October 22, 1946, the said Louis D. Colbert executed what was purported to be his Last Will and Testament. The names of James F. Haynes, Arthur A. Benz and V. A. Cobbell of Fairbanks, Alaska, appeared on the will as witnesses. (T.R. 278-279-280.) On the 23rd day of October, 1946, the said L. D. Colbert signed a letter directed to the Fairbanks Agency authorizing Thelma Hayes to have access to his safe deposit box, which letter was witnessed by Kenneth D. Wire and Arthur A. Benz. (T.R. 286.)

On the 23rd day of October, 1946, the First National Bank of Fairbanks, Alaska, signed a petition for appointment as guardian to take the care, custody and management of the estate of Louis D.

Colbert, an incompetent person. (T.R. 272-273-274.) After a hearing upon said petition on the 15th day of November, 1946, findings of fact, conclusions of law and judgment were signed by the judge of the Probate Court for the Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, appointing said bank guardian to take the care, custody and management of the estate of Louis D. Colbert, an incompetent person. (T.R. 261, 262, 263, 264, 265, 266, 267.)

Louis D. Colbert died on the 25th day of May, 1947, and on the 27th day of May, 1947, the First National Bank of Fairbanks, Alaska, was appointed executor under a will which had been executed on the 14th day of November, 1938. (T.R. 276, 277.) On the 1st day of August, 1947, the appellant filed a petition to revoke the Letters Testamentary and the bank filed its answer on the 18th day of August, 1947. The case was tried by the judge of the Probate Court on the 16th day of June, 1950, which was after a motion was filed by the bank to dismiss the case for want of prosecution.

The judgment and order of the District Court from which this appeal is taken is not included in the transcript of record.

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#### POINTS AND AUTHORITIES.

*In Re Strong* (1917) 166 N.Y.S. 862, where it appeared that the testatrix two years prior to the execution of the codicil to her will developed arterio-

sclerosis, which was progressive, and became subject to physical attacks or seizures accompanied with convulsions which sometimes caused her to fall and rendered her unconscious for several hours, with effects continuing longer, which attacks occurred with varying frequency, usually three times a week, sometimes with an interval of two weeks between, and continued until her death, it was held that the burden of proof rested on the proponents of the will to establish mental capacity of the testatrix at the time of the execution of the codicil. (168 A.L.R. 998.)

(1) It should be noted at the outset that Rule 53 (e)(2) of the Federal Rules of Civil Procedure, 28 U.S.C.A. following Section 723c, provides that “\* \* \* the Court shall accept the master’s findings of fact unless clearly erroneous.” While that rule applies solely to the District Courts, we think it should be applied here by analogy, especially if it conforms with the general practice existing before the promulgation of that rule. We have applied Rule 41, by analogy, to practice in this Court. (*National Labor Relations Board v. Remington Rand, Inc.*, 130 F. (2d) 925; *In re Barnett*, 2 Cir., 124 F. (2d) 1005, 1013; *National Labor Relations Board v. Arcade-Sunshine Co., Inc.*, 132 F. (2d) 8; *United States v. Wells et al., Executors*, 283 U.S. 120; Supplementing Annotation in 7 A.L.R. 575). The rule that proceedings for the appointment of a guardian or conservator are admissible upon the question of the ward’s mental condition was stated in the earlier annotation. It has since been held that a proceeding

for appointment of guardian for a mental incompetent less than a year subsequent to execution of a will is admissible on the question of progressive mental disease antedating the execution of the will. (*Re Austin* (1922) 194 Iowa 1217, 191 N.W. 73, 68 A.L.R. 1312, 159 Fed. 55.)

The credibility and weight of evidence are questions for the jury. (*Re Estate of Ida E. Forsythe, Deceased, Mary Clabots et al., Respts., v. G. I. Badeaux et al., Appts.*, 221 Minn. 303, 167 A.L.R. 1, 22 N.W. (2d) 19.)

Errors alleged in the findings of the Court are not subject to reversion by the Circuit Court of Appeals, or by this Court, if there was any evidence upon which such findings could be made. (*Tooley v. Pease*, 180 U.S. 131; *Hathaway v. National Bank*, 134 U.S. 498; *St. Louis v. Retz*, 138 U.S. 241; *Runkle v. Burnham*, 153 U. S. 225.)

There was no error in submitting the question of testator's insanity to the jury with the instruction that if they found that the insanity was permanent in its nature and character the presumptions were that it would continue and the burden was on those holding under the will to satisfy the jury that he was of sound mind when it was executed. (*Keely v. Moore*, 196 U.S. 39; 57 Am. Jur. 97, Sec. 89; 68 C.J. 446, Sec. 44; 57 Am. Jur. 125, Sec. 133.)

In contest of a will on ground of alleged incompetency of testatrix, testimony of subscribing witnesses who were lawyers who drew the will and who



had never seen testatrix prior to date on which will was drawn was not conclusive of competency of testatrix to make a will, and their testimony could be overcome by other testimony showing condition of mind of testatrix a reasonable time before and after execution of will. (*Ergang et al. v. Anderson et al.*, 38 N.E. (2d) 26.)

A person who is not an expert may give his opinion concerning mental capacity of a testator if it appears that such witness has an acquaintance with person whose competency is in question and relates facts and circumstances which afford reasonable ground for determining soundness or unsoundness of mind of such person and jury may give such value to opinion so expressed as capacity, intelligence and observation of witness who forms it may warrant. (*Ergang et al. v. Anderson et al.*, 38 N.E. (2d) 26.)

Where the issue is the mental capacity of a testator at the time of making a will, evidence of incapacity within a reasonable time before and after is relevant and admissible. (*In re Bullard's Estate, McAllister et al. v. Rowland*, 144 N.W. 412.)

When such a judgment is rendered in proceedings instituted after the will is made, and does not find the testator incompetent at such prior time, it is competent evidence, and whether it should be admitted depends upon its probative value as tending to prove as would other evidence of the mental condition of the testator at subsequent time. Whether it has probative value, or is too remote, is largely



for the trial Court to determine. In this case, the decision of the trial Court that the exclusion of such judgment was prejudicial error is sustained. (*In re Bullard's Estate, McAllister et al. v. Rowland*, 144 N.W. 412.)

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### ARGUMENT.

The record shows that Eleanor M. Ely, as United States Commissioner and ex officio Probate Judge, after a hearing, appointed the First National Bank of Fairbanks, Alaska, as guardian to take the care, custody and management of the Estate of Louis D. Colbert, an incompetent person, and entered findings of fact, conclusions of law and a judgment based upon the testimony introduced at the hearing.

The findings of fact, conclusions of law and judgment upon the trial of this case were entered by Clinton B. Stewart, who was the United States Commissioner and ex officio Probate Judge at the time of the first trial of this case. Upon the appeal to the District Court the testimony entered in the Probate Court was considered, as well as the additional testimony of witnesses who testified at the trial in the District Court. It is evident from the findings of fact, conclusions of law and judgment which were entered as a result of these trials that the testimony introduced on behalf of the appellant was not believed by the judges of the above-entitled Courts. All of the witnesses testified on behalf of appellant that the mind of Louis D. Colbert was as clear as a bell

and that there were no signs of insanity at any time he was observed by these witnesses. If the testimony of appellant's witnesses were true there would be no question as to his sanity. It is evident that the trial Courts were impressed with the truth of the testimony of appellee's witnesses. In view of the authorities, it would seem that it was the providence of the trial Court to determine the credibility of the witnesses. They had an opportunity to observe their appearance upon the stand, the manner in which they testified and the reasonableness of their testimony. Where the testimony is absolutely conflicting as it is in this case, it is the duty of the trial Court to determine the truth.

If the witnesses in this case, who testified on behalf of the appellee, were telling the truth the only question which can arise is whether or not the evidence offered is sufficient to justify finding that Louis D. Colbert was not of sound and disposing mind and memory and capable of executing a will.

It will be observed from the testimony that Arthur A. Benz, who was in the employ of appellant as a bartender and whose name appears on the power of attorney as a witness, and also on the wills which were prepared by Warren A. Taylor, attorney for appellant, was unable to remember when he witnessed the will, which is marked as Exhibit "D", and which according to the testimony of Mr. Taylor was prepared by him on the afternoon of October 21, 1946, and was not signed until shortly after midnight on

October 23. It would seem that there was some reason in the mind of Mr. Benz why he should not say that he went to the hospital shortly after midnight to witness said will. There was no attempt made by Mr. Taylor to explain why it was necessary to wait until after midnight before taking the will to the hospital. From the record it is not clear as to who retained possession of the will or how, when or by whom the interlineations were made which were claimed to have been initialled by Mr. Colbert. This first will, as well as the second one, were also witnessed by Mr. V. A. Cobbell, who did not appear at the trial of the case as a witness.

The power of attorney above referred to and signed by Louis D. Colbert on the 7th day of October, 1946, according to the testimony of Warren A. Taylor, attorney for appellant, was prepared by him at the request of Louis D. Colbert. The record is silent as to when he prepared the power of attorney and as to where it was signed by the said Louis D. Colbert. There is nothing in the record to show when Mr. Taylor was requested to prepare the power of attorney by Mr. Colbert and no reason was given as to why the instrument was not signed by Mr. Colbert at the time it was prepared. Thelma D. Hayes first used the power of attorney on the 16th day of October, 1946, at which time she had it in her possession and according to the testimony of Mr. Taylor, it was acknowledged by him on the 17th day of October, 1946, while Mr. Colbert was in the hospital.

There is nothing to show why it was necessary for Mr. Taylor to go to the hospital on the 17th day of October to acknowledge the power of attorney, or who requested him to go, or who was present at the time it was acknowledged. There was no evidence as to his condition on the 17th day of October, 1946, by any of the witnesses who witnessed the power of attorney or by appellant or any of her witnesses.

The record discloses that on the 16th day of October, 1946, Thelma D. Hayes, under the power of attorney, withdrew \$100.00 from the account of Louis D. Colbert in the First National Bank, \$100.00 on the 18th day of October, 1946, and \$100.00 on the 22nd day of October, 1946. The Exhibit "N" introduced by appellant shows that appellant entered into an agreement on the 23rd day of September, 1946, with L. D. Colbert which was in connection with the assignment of a judgment secured by Allison against Thelma D. Hayes, and that Thelma D. Hayes promised and agreed to pay to Louis D. Colbert the sum of \$200.00 per month until the full amount of \$3,556.39 had been paid, and the contract also provided for an additional payment of \$300.00 on the 1st day of January, 1947. No claim was made by Thelma D. Hayes that she ever made any of these payments and no excuse was offered as to why she failed to make the payments, and no satisfactory explanation was ever made as to what she did with the money withdrawn from the account of Louis D. Colbert. The evidence shows that the reason that it



was necessary for the bank to apply for appointment as guardian was the fact that she was withdrawing Mr. Colbert's money from the bank and the further fact that it was reported that Mr. Colbert was of unsound mind and unable to look after his own affairs.

The testimony of Dr. A. J. Schaible shows that Mr. Colbert first came to him for medical attention in 1933. He testified that he had been called on many occasions to observe and testify regarding persons accused of being insane. Under the practice in Alaska it is necessary for a physician to observe and testify in regard to persons so accused. He testified that he saw Louis D. Colbert every day from the time he was sent to the hospital on the 9th day of October up to the 20th day of November, 1946. (T.R. 192.) It was the doctor's opinion that Mr. Colbert was not of sound and disposing mind and memory and that he was not capable of executing a will. Considering his training in connection with cases of this kind it would seem that he was better qualified to testify as to the sanity of Mr. Colbert than any other witness. The witnesses, Mike Stepovich, Julien A. Hurley, Harvey Van Hook, James E. Barrack, Arthur Luthrow and Frank Young, friends and acquaintances of Lou Colbert, all testified in effect that in their opinion from their observations of Mr. Colbert after he entered the hospital and during the month of October, that he was not of sound and disposing mind and memory.



The authorities hold that the question of the competency of a person to execute a will must be determined entirely upon the particular facts of each case. There seems to be no exact or binding rule by which the Court in cases of this kind are to be governed.

In view of all of the evidence in the case and the fact that all of the witnesses, with the exception of the taxi driver, who gave any testimony on behalf of appellant as to the condition of Mr. Colbert at the time the wills were executed in October, 1946, were in the employ of the appellant, and the further fact that Mr. Cobbell was not called as a witness undoubtedly influenced the decision of the probate judge and the district judge in denying the petition of appellant.

There is no satisfying evidence of any kind as to why Mr. Colbert should have left his property to Thelma D. Hayes instead of his sister and niece, and we believe the judgment of the District Court should be affirmed.

Dated, Fairbanks, Alaska,  
May 16, 1951.

Respectfully submitted,  
JULIEN A. HURLEY,  
*Attorney for Appellee.*

I hereby certify that I mailed a typewritten copy of the foregoing Brief of Appellee to J. L. McCarrey, Jr., Anchorage, Alaska, on this 12th day of May, 1951.

JULIEN A. HURLEY,  
*Attorney for Appellee.*



No. 12,771

IN THE

United States Court of Appeals  
For the Ninth Circuit

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THELMA D. HAYES,

*Appellant,*

vs.

FIRST NATIONAL BANK OF FAIRBANKS,

Executor of the Estate of Louis D.

Colbert, deceased,

*Appellee.*

Appeal from the United States District Court for the  
Territory of Alaska, Fourth Division.

PETITION FOR REHEARING.

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J. L. MCCARREY, JR.,

Anchorage, Alaska,

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Fairbanks, Alaska,

*Attorneys for Appellant  
and Petitioner.*

FILED

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No. 12,771

IN THE  
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*Appellant,*

VS.

FIRST NATIONAL BANK OF FAIRBANKS,  
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Appeal from the United States District Court for the  
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**PETITION FOR REHEARING.**

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*To the Honorable William Denman, Chief Judge, and  
to the Honorable Associate Judges of the United  
States Court of Appeals for the Ninth Circuit:*

Comes now the above named appellant, THELMA D. HAYES, and files this, her Petition for Rehearing, and for grounds states:

**I.**

That this Honorable Court, in affirming the Opinion of the District Court for the Territory of Alaska, Fourth Division, has set up a dangerous precedent in

the law of evidence regarding contest of wills, in that it permits competent, uncontradicted testimony to be disregarded in favor of weaker evidence and shifts the burden of proof from the contestant to the proponent. To allow this judgment to stand will work great hardship and damage, and in effect take away from aged and infirm individuals the right given them by 3 A.C.L.A. 59-1-2 to dispose of their property.

## II.

From the Opinion of the United States Court of Appeals for the Ninth Circuit, filed October 29, 1951, it is apparent that the Court decided this case believing that it could not consider the testimony of witnesses supporting the competency of the testator, Louis D. Colbert. It is the opinion of the undersigned that it was the duty of the Court to examine all testimony submitted with the record, and having done so, it could only conclude that the decision of the District Court was clearly and manifestly against the weight of the evidence. The Circuit Court of Appeals for the Sixth Circuit has stated as follows:

*Horvath v. McCord Radiator & Mfg. Co.*, 100 F. (2d) 326, 332, 333 (1938).

“The findings of a Master or the district court are presumptively correct and cannot be assailed unless an examination of the record shows that the Master or the lower court made no specific findings of fact in reference to the precise issues or the physical facts demonstrate the unsoundness of the facts found or if the Master or court man-

ifestly misapprehended the evidence or went against its clear weight, or applied an erroneous rule of law which was necessary to the making of the fact findings. *Uihlein v. General Electric Co.*, 7 Cir., 47 F. 2d 997, 1001.

“In considering equity cases on appeal, the court must give much weight to the finding of the Master or district court on disputed issues. However, we are not required to accept such findings in the same sense that we accept the verdict of a jury in an action at law respecting an issue over which there is a dispute, and if on the *whole record* the evidence decidedly preponderates against the findings of the Master, the reviewing court is not bound by them. *Vandenburgh v. Truscon Steel Co.*, 6 Cir., 277 F. 345 \* \* \*” (Emphasis supplied).

From a consideration of the entire record of the case, it is apparent that the overwhelming weight of the evidence is in favor of the proponent of the will. Three competent witnesses testified as to the condition of the testator's mind at the actual moment that the will was executed, and other witnesses who had seen him on the day in question gave proof to the fact that he was able to understand fully the nature of his act. This testimony stands uncontradicted inasmuch as the appellee failed to produce any witness who had seen or talked to the testator upon the day the will was executed and who might have controverted the appellant's witnesses. There were nurses and Sisters on duty at the hospital at all times, as well as other patients who could have been called to testify on this subject, but



the appellee did not see fit to call any of these persons. There is nothing in the record which discloses that the appellee made any attempt to discredit the testimony of the appellant's witnesses and therefore their statements must be accepted as true and the decision based thereon.

I quote from *State ex rel. Nagle, Atty. Gen. v. Naughton et al.*, 63 P.2d 123, 124:

"This is a suit in equity, and the rule is well established that the judgment of the trial court will not be disturbed unless the evidence preponderates against it. In a situation such as here presented, it becomes the duty of this court to review the evidence presented by the record; and if this court determines that the findings of the trial court are not sustained by a preponderance of the evidence, to set such findings and judgment aside and 'makes its own conclusions'.

"But what is to be said of a case of this character where the uncontradicted evidence establishes the plaintiff's cause of action, and where the record is barren of any suggestion that plaintiff or any of his witnesses is unworthy of belief, but, notwithstanding these facts, the trial court finds against the plaintiff? Where, as in this instance, a cause is tried to the court, its decision or finding has the same effect as the verdict of a jury, and, when contrary to or not sustained by the evidence, will be set aside. 20 R.C.L. p. 280 Sec. 62. *The rule that the trial court may not disregard uncontroverted credible evidence is fundamental.* Haddox v. Northern Pac. Ry. Co., 43 Mont. 8, 113 P. 1119." (Emphasis supplied).

It is the opinion of the undersigned that there is absolutely no evidence to support the finding that the testator was not of sound mind on the day and at the time that the will was executed because no witnesses were produced to testify on this subject. It is true that mental condition prior and after execution of a will have some bearing as to the condition of the mind of the testator at the time the will was executed, but in the face of positive testimony that he was capable of understanding what he was doing, such testimony must be disregarded. The rule is succinctly stated in Vol. 1, Bancroft's Probate Practice, 2nd Ed., Sec. 212, page 523:

“Where the contestant has the burden of proof upon such an issue, it devolves upon him to prove incompetency of the testator *at the very moment of the execution of the will*; that the will upon its face was not a rational act; that it was not made during a lucid interval; and that the delusion of the testator controlled his volition and its execution. In re Schwartz's Estate (1945) 67 Cal App 2d 512, 155 P2d 76.” (Emphasis supplied).

### III.

That the Court erred in stating that “The question before us is whether Hayes has sustained her burden of proof that Colbert on October 22, 1946, had the required sound and disposing mind to execute the will of that date.”

I quote from Vol. 1, Bancroft's Probate Practice, Sec. 206, pages 499, 500:

“In California, Utah, and Wyoming, it is directly held that upon opposition to probate the contestant has the burden of prevailing by a preponderance of all the evidence upon the question of want of testamentary capacity.<sup>7</sup> The California court has held that mere proof of mental derangement or even of insanity in a medical sense is not sufficient to invalidate a will, but the contestant is required to go further and prove either such a complete mental degeneration as denotes utter incapacity to know and understand those things which the law prescribes as essential to the making of a will, or the existence of a specific insane delusion which affected the making of the will in question.<sup>8</sup>”

And in the same volume, Sec. 207, pages 503 and 504, as to presumptions:

“Such burden never shifts, but remains the same throughout any litigated controversy. On the other hand, when a presumption is raised which *prima facie* establishes an issue one way or the other for the time being, in default of some evidence to combat such presumption the holding must be in accordance therewith. Sanity and mental competency, for example, are presumed to have existed until the contrary is established by competent proofs.<sup>20</sup> Furthermore, testamentary capacity is always presumed, and the *burden rests on a contestant to show affirmatively and by a preponderance of the evidence* that the testator, *at the time of executing the will*, was of unsound mind and that unsoundness actually affected or controlled testamentary capacity.<sup>1</sup>” (Emphasis supplied).

The appellee has failed utterly to introduce any evidence, much less prove by the *preponderance* of the evidence that on the day in question and at the specific time the will was executed that the testator was of unsound mind. And the record is completely void of any evidence which would tend to show that the hallucinations suffered by the testator or his forgetfulness actually affected or controlled the making of his will. To quote again from Bancroft's Probate Practice, Sec. 212, pages 523, 524:

“In order that a will may be set aside for insanity or mental derangement, the abnormalities of mind must have had a direct bearing on the testamentary act, and the evidence must establish the fact that the testator devised or bequeathed his property in a manner which, except for the mental infirmities, he would not have done.<sup>19</sup> Thus, old age, feebleness, forgetfulness, filthy personal habits, personal eccentricities, failure to recognize old friends or relatives, physical disability, absent mindedness and mental confusion do not furnish grounds for holding that a testator lacked testamentary capacity.<sup>19-5</sup> (Ridgway's Estate (1949) 92 Cal App2d 325, 206 P2d 892; Doty's Estate (1949) 89 Cal App2d 747, 201 P2d 823; Alegria's Estate (1949) 87 Cal App2d 645, 197 P2d 571).”

The will of Louis D. Colbert cannot be considered an unnatural will, since it makes provision for the nearest relative of the testator and the person who befriended him most in this life. There is no showing that but for his mental attitude he would have dis-



posed of his property in some other manner. In fact the evidence is overwhelming to the fact that he had a keen awareness of the nature of his act and objects of his bounty, which stands uncontradicted, and which cannot be contradicted, since the two documents executed within a day of each other as last wills and testaments of the said Louis D. Colbert stand as valid proof of the comprehension of which he was capable, in that he ordered specific changes in the document first executed, and expressed complete satisfaction with the second. Even Dr. Schaible, in answer to a hypothetical question, testified that "I meant a person who he said a person who desired to make a will on the 15th and called an attorney to make the will according to his instructions and then later signed it and later called him back presumably—someone who did all that I would say he is of presumably of sound and disposing mind, if he did it according to his directions." (TR 203). And at TR 205, in answer to the question: "Doctor Schaible, when a man with this senile type of structure to which you referred Mr. Colbert had at this time, have periods when he would be clear and of disposing memory?", he replied: "I think so . . . It is possible." And the District Court as well as the Probate Court believed the doctor. Such evidence cannot be disregarded. To do so imposes an undue burden upon a proponent of a will in the Territory of Alaska which is not present in any other jurisdiction. It is the opinion of the undersigned that this decision should not stand and become the precedent for all subsequent contest of wills.



WHEREFORE, the appellant prays that this Honorable Court grant her petition for a rehearing of this matter.

Dated, Anchorage, Alaska,  
November 26, 1951.

Respectfully submitted,  
J. L. MCCARREY, JR.,  
WARREN A. TAYLOR,  
*Attorneys for Appellant  
and Petitioner.*



CERTIFICATE OF COUNSEL.

J. L. MCCARREY, JR., of counsel for the appellant and petitioner, in the foregoing matter, does hereby certify that in his opinion this Petition for Rehearing is well founded and based upon valid reasons, and that the same is not interposed to create delay in the disposition of this case.

Dated, Anchorage, Alaska,  
November 26, 1951.

J. L. MCCARREY, JR.,  
*Of Counsel for Appellant  
and Petitioner.*















